

**Bond University**

## **DOCTORAL THESIS**

### **Mainstreaming Therapeutic Jurisprudence and the Adversarial Paradigm: Incommensurability and the Possibility of a Shared Disciplinary Matrix**

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**MAINSTREAMING THERAPEUTIC JURISPRUDENCE AND  
THE ADVERSARIAL PARADIGM—INCOMMENSURABILITY  
AND THE POSSIBILITY OF A SHARED DISCIPLINARY  
MATRIX**

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## **Abstract**

Problem-solving courts appear to achieve outcomes that are not common in mainstream courts. There are increasing calls for the adoption of more therapeutic and problem-solving practices by mainstream judges in civil and criminal courts in a number of jurisdictions, most notably in the United States and Australia. Currently, a judge who sets out to exercise a significant therapeutic function is likely to be doing so in a specialist court or jurisdiction, outside the mainstream court system, and arguably, outside the adversarial paradigm itself. To some extent, this work is tolerated but marginalised.

However, do therapeutic and problem-solving functions have the potential to help define, rather than simply complement, the role of judicial officers? The core question addressed in this thesis is whether the judicial role could evolve to be not just less adversarial, but fundamentally non-adversarial. In other words, could we see—or are we seeing—a juristic paradigm shift not just in the colloquial, casual sense of the word, but in the strong, worldview changing sense meant by Thomas Kuhn?

This thesis examines the current relationship between adversarialism and therapeutic jurisprudence in the context of Kuhn's conception of the transition from periods of 'normal science', through periods of anomaly and disciplinary crises to paradigm shifts. It considers whether therapeutic jurisprudence and adversarialism are incommensurable in the Kuhnian sense, and if so, what this means for the relationship between the two, and for the agenda to mainstream therapeutic jurisprudence.

The thesis asserts that Kuhnian incommensurability is, in fact, a characteristic of the relationship between adversarialism and therapeutic jurisprudence, but that the possibility of a therapeutic paradigm shift in law can be reconciled with many adversarial and due process principles by relating this incommensurability to a broader disciplinary matrix.

## **Certificate**

This thesis is submitted to Bond University in fulfilment of the requirements of the degree of Doctor of Philosophy.

This thesis represents my own original work towards this research degree and contains no material that has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Signature: ... ..

Date: ... ..

## Acknowledgements

This thesis represents the culmination of a number of years of research and writing on the scope and promise of therapeutic jurisprudence as a significant force in both jurisprudence and in legal practice.

After experiencing some of the best and worst features of the legal system in professional practice, I came to academia with a strong desire to understand why the system seemed to have changed so little and so slowly, despite its obvious strengths but even more obvious failings. With a background in analytical philosophy from my master's degree at the University of Queensland and a solid grounding in the realities of contemporary legal training, both as a law student and as a lecturer, a theoretical examination of the relationship between adversarialism and therapeutic jurisprudence was somewhat inevitable.

During the course of my study of the relationship between the nature of paradigm shifts and what I refer to in the thesis as 'juristic models', I have published the following journal articles (and book chapters) relating to this work and theme, and I thank the editors of these journals for accepting and editing my work. They are as follows:

'The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' (2011) 4(1) *Washington University Jurisprudence Review*.

'From Assimilation to Diversity—Changing Paradigms of Racism in Australia' in G Antonopoulos and J Winterdyk (eds), *Racial Victimisation: International Reflections and Perspectives* (2008).

'How to Be Selfish and Political Without Really Trying—Time for a Paradigm Shift in the Resolution of Disputes Within Queensland's Not-for-Profit Associations' (2006) *QUT Law and Justice Journal*.

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‘Is Therapy a Valid Role of a Mainstream Civil Judge?’ (Paper presented at the Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne, Victoria, Australia, 4–7 May 2010).

‘Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence’ (Paper presented at the HDR Symposium, Bond University, 2011).

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# Chapter 1

## Introduction

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### 1.1 What This Thesis Is About

According to Freiberg:

Though still in their early stages, it has been argued that problem-oriented courts have moved beyond the experimental mode and into the mainstream of justice. Some have gone as far as to suggest that a major paradigm shift has occurred. Though one may be sceptical about such a sweeping claim, it is clear that this phenomenon requires serious consideration.<sup>1</sup>

The aim of this thesis is engage in just this consideration, an undertaking that is long overdue. Although a decade has passed since Freiberg issued this challenge to the legal profession and to the academy, very little formal study has been made of the nature of the fundamental relationship between therapeutic jurisprudence<sup>2</sup> and the traditional adversarial court

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<sup>1</sup> Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions To Intractable Problems?' (2001) 11 *Journal Of Judicial Administration* 8.

<sup>2</sup> Freiberg notes that 'the overlay of a philosophical basis on the problem-oriented court model came with the development of the concept of "therapeutic jurisprudence"', *ibid* 11.

system, and the implications (both theoretical and practical) of that relationship.<sup>3</sup> The implications of a 'paradigm shift' would be especially significant.

There are an increasing number of specialist criminal courts making use of practices that are informed by the principles and methods of therapeutic jurisprudence.<sup>4</sup> These courts are often referred to collectively as problem-solving courts, problem-oriented courts or less paternalistically as solutions-focused courts.<sup>5</sup> The general goal of these courts is to facilitate and support offenders to act as autonomous solution agents or change agents in their lives, in order to reduce the likelihood of further offending by helping offenders to confront and evolve the issues in their lives that give rise to offending conduct.

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In Chapter 5 of this thesis, I consider in more depth the extent of the actual relationship between therapeutic jurisprudence and the operating philosophies and processes of a range of problem solving courts—a question about which there are a number of views.

<sup>3</sup> Several quite recent publications have sought to initiate that study and conversation, but a thorough and rigorous analysis has yet to be conducted. The most relevant studies so far are: Nigel Stobbs, 'The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' (2011) 4(1) *Washington University Jurisprudence Review* 97; Michael King, Arie Freiberg, Becky Batagol and Ross Hyams *Non-Adversarial Justice* (2009).

<sup>4</sup> Specialist courts are those that are able to operate in less/non-adversarial ways as a result of modified rules of procedure, which suspend or limit adversarial practices. See, eg, Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93, in which the judicial authors explain the modified rules within the *Family Law Act 1975* (Cth) which allow for the use of LATs (less adversarial trials). In the US, these now include: drug courts, truancy courts, gambling courts, domestic violence courts, community courts, mental health courts, gun courts, homeless courts and veterans courts. For a description of each of these jurisdictions, see *National Drug Resource Centre*: <<http://www.ndcrc.org/faq/types-problem-solving-courts>>.

<sup>5</sup> Michael King, 'Should Problem Solving Courts be Solution-Focused Courts?' (2011) 80 *Revista Jurídica de la Universidad de Puerto Rico* 1005.

The therapeutic jurisprudence movement was, as originally conceived, an attempt to apply research findings from the social sciences to legal processes in order to make those legal processes less damaging to the well-being of those involved with and affected by them. That well-being could encompass psychological physical, economic and social factors.<sup>6</sup>

The normative rationale of the therapeutic jurisprudence movement is that there exists an obligation on the part of the legal system to promote therapeutic outcomes and reforms and to identify, limit and, where possible, ameliorate anti-therapeutic roles and processes.<sup>7</sup> The influence of the movement in achieving these goals, especially through the operation of the problem-solving courts, has been widespread and significant.<sup>8</sup>

More recently, however, the therapeutic jurisprudence movement, in what is sometimes referred to as its 'maturation phase',<sup>9</sup> has set itself a somewhat broader and more ambitious agenda in order to build on these successes. This agenda includes positively influencing the work and

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<sup>6</sup> David Wexler, 'Putting Mental Health into Mental Health Law' (1992) 16(1) *Law and Human Behaviour* 27. King observes that although the sort of 'well-being' that therapeutic jurisprudence values and promotes was originally limited by Wexler and Winick to the physical and psychological contexts, it could conceivably 'encompass physical, psychological, emotional, relational, social and economic dimensions': Adrian Evans and Michael King, 'Reflections on the Connection of Virtue Ethics to Therapeutic Jurisprudence' (2011) 35(3) *UNSW Law Journal* 717, 722.

<sup>7</sup> A thorough unpacking and discussion of the meaning and ambit of the terms 'therapeutic' and 'anti-therapeutic' is undertaken in Chapter 6, where I consider whether therapeutic jurisprudence is able to contribute paradigmatic exemplars to a juristic model.

<sup>8</sup> Apart from the expansion of the number and types of specialist courts applying therapeutic principles across jurisdictions, King also observes that: 'Therapeutic jurisprudence has become one of the most significant influences in court practice and approaches to judging over the last decade or more': Michael King, 'Therapeutic Jurisprudence's Challenge to the Judiciary' (2011) 1 *Alaska Journal of Dispute Resolution* 1.

<sup>9</sup> Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2006) 30(2) *Thomas Jefferson Law Review*, 575.



functions of judges and lawyers outside the specialist courts and among those who have not had significant experience or training in the principles of therapeutic jurisprudence. This influence that it seeks is more significant than the making of simple, ad hoc and isolated recommendations about how mainstream judges and courts<sup>10</sup> can be less anti-therapeutic in achieving their current (adversarially defined and validated) purposes and goals.<sup>11</sup>

The judicial functions and techniques seen within the specialist courts appear to be able to achieve results that are not possible in courts that

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<sup>10</sup> 'Mainstream' is a term often used by therapeutic jurisprudence advocates and practitioners to refer to the more traditional, adversarial courts and style of legal practice that do not actively seek to make therapeutic reforms. See, eg, Donald Farole and Michael Rempel et al, 'Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts' (2005) 26 *Justice System Journal* 57–76. Freiberg claims 'specialised courts may be problematic if they are seen as too narrow or become too isolated from the mainstream': Freiberg, above n 1, 12. Discussing the future of therapeutic jurisprudence as part of what she conceives of as the 'Comprehensive Law Movement' Daicoff predicts that '[i]t will become incorporated into mainstream legal practice as part of the usual work that lawyers provide for their clients': Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2006) 6(1) *Pepperdine Dispute Resolution Law Journal* 61.

<sup>11</sup> In a typical drug court, for instance, the judge is part of a statutory team whose main role is to guide and monitor an offender's path through a very intensive rehabilitation program. Although the judge retains an adjudicative role in these courts, it is arguable that the main function and goal of the court is therapeutic. There are strong data to suggest that drug courts are, in fact, operating according to a theoretical model based on therapeutic jurisprudence. In one major empirical study, the authors analysed and tested therapeutic jurisprudence as the theory behind the drug court mission and its day-to-day operations. A logit model was used to assess the strength of specific theoretical components on an offender's ability to complete the drug court program. They concluded that the manner of interactions between the judge and offenders can increase the likelihood of an offender's ability to remain abstinent and stay engaged in treatment for the duration of the drug court program: Scott Senjo and Leslie Leip, 'Testing and Developing Theory in Drug Court: A Four-Part Logit Model to Predict Program Completion' (2001) 12 *Criminal Justice Policy Review* 66–87. This ad hoc influence has sometimes been referred to by therapeutic jurisprudence advocates as producing books of 'handy hints' for judges and lawyers.

operate solely according to adversarial principles and practices.<sup>12</sup> There are calls for mainstream criminal courts (non-specialist courts) to migrate some of these successful practices from the specialist courts, in order to replicate these sorts of outcomes on a larger scale. If this migration occurs, it may be a strong indication that the criminal justice system (or at least the role of the criminal court) is undergoing, or about to undergo, paradigmatic change. As will be seen in Chapter 5, there is no shortage of rhetoric to this effect, but this thesis seeks to make a formal theoretical assessment about paradigm change.

One of the strongest voices for this mainstreaming is that of one of the movement's founders, David Wexler,<sup>13</sup> who has recently noted that despite the fact that therapeutic jurisprudence did not evolve within the so-called problem-solving courts, it has always been closely associated and often identified with these specialist courts because the styles and functions of their judges are largely informed and endorsed by the therapeutic

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<sup>12</sup> Research suggests, for instance, that specialist drug courts are far more effective at preventing recidivism in individual offenders than are mainstream criminal courts. See, eg, Don Weatherburn, Craig Jones, Lucy Snowball and Jiuzhao Hua, 'The NSW Drug Court: A Re-evaluation of its Effectiveness' (2008) 121 *Contemporary Issues in Crime and Justice*, which found that offenders treated in the NSW Drug Court were 37 per cent less likely to offend than those given a custodial sentence by a mainstream court.

<sup>13</sup> Communicating with an international email discussion group established to study and promote therapeutic jurisprudence, Professor Wexler recently wrote to gauge and encourage interest in the formation of projects to mainstream:

For a variety of reasons, there seems to be considerable interest at the moment in thinking about how therapeutic jurisprudence (TJ) might better be used in mainstream courts, especially in a criminal law context. In other words, the experience with the use of TJ in problem-solving courts has led a number of us to ask how TJ might be used also in a broader context. So, we are writing today to see if we can encourage you to play a role -- however modest (or ambitious, of course!) in this overall project in any way. You may wish to just share ideas with us or you might like to undertake a local project alone or with a small team you might form.

Email from Professor David Wexler to therapeutic jurisprudence listserv, 18 August 2012—reprinted with the author's permission.

jurisprudence literature.<sup>14</sup> Wexler notes that economic pressures, such as those created by soaring prison populations and high rates of recidivism, have stimulated an interest from the legal mainstream in migrating some therapeutic jurisprudence techniques and functions into the general criminal courts.

The interest from within the movement itself in mainstreaming is very significant. Many therapeutic jurisprudence advocates, most of whom are experienced judges and legal practitioners, are convinced that their successes in applying therapeutic principles in their own work and jurisdictions have the potential to enrich and improve the effectiveness of mainstream courts. Others, with an eye to the future of the movement, are concerned that the generation of interest, support and commitment to therapeutic jurisprudence within the mainstream of the profession is the best and only way to guarantee its future survival.<sup>15</sup>

The received view is that the criminal justice system, and hence courts and judges within that system, currently operate pursuant to an adversarial paradigm.<sup>16</sup> This is no small claim or statement. This view about the paradigmatic status of adversarialism assumes that legal systems in general<sup>17</sup> can be based on paradigms, which opens up a wide range of theoretical and practical questions, many of which are dealt with in this thesis. Despite the purported currency of an adversarial paradigm, many legal proceedings now appear unable to be explained in adversarial terms.

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<sup>14</sup> David Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices' in Jane Donoghue (ed), *Therapeutic Jurisprudence and Problem-Solving Justice* (2013) (forthcoming). See also Michael Jones, 'Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners' (2012) 5(4) *Phoenix Law Review*.

<sup>15</sup> David Rottman, 'Does Effective Therapeutic Jurisprudence Require Specialised Courts (And Do Specialised Courts Imply Specialist Judges)?' (2000) *Spring Court Review* 22.

<sup>16</sup> However, as will be explained in chapters 2 and 6, this does not imply that less adversarial or non-adversarial practices do not, or cannot, operate in the current system.

<sup>17</sup> Or what I will refer to in Chapter 3 as 'juristic models'.

Mainstreaming therapeutic jurisprudence might significantly broaden this trend.

Freiberg asked in 2003, and then again in 2007, whether the appearance of therapeutic jurisprudence in Australian courts was evidence of some sort of 'paradigm shift' in the criminal justice system, or whether it was just 'pragmatic incrementalism'.<sup>18</sup> He asked whether we were on the crest of a wave of fundamental reform in the court system or just witnessing a bit of tinkering at the edges. Freiberg asserts that adversarialism *is* the current paradigm at the heart of the criminal justice system but that its status is being increasingly eroded.

He is of the view that therapeutic jurisprudence could provide a 'constructive alternative' to what he identifies as the 'flawed adversarial paradigm', which he says presently dominates the criminal justice system. He observes that:

Not only does the criminal justice system overall not function adversarially for the vast majority of cases, but changes in a number of areas have affected the adversarial paradigm in ways that require a fundamental re-examination of the operation of the courts, of the role of judicial officers and lawyers and, significantly, of the way in which lawyers of the future are educated.<sup>19</sup>

Each of these 'cases', (to which Freiberg is referring) represents a problem for the explanatory power of the adversarial paradigm. If Freiberg is correct, this may suggest that the criminal justice system is entering a period of ontological and procedural crisis.

Ought we to characterise these calls from Freiberg and the therapeutic jurisprudence advocates as recommendations for a more responsive and user-friendly version of our current adversarial courts, or are they evidence

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<sup>18</sup> Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2003) 20(2) *Law in Context* 6, 19; Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205, 221.

<sup>19</sup> *Ibid* 205.

of a felt need for a deeper transformation?<sup>20</sup> Does the accelerating adoption of therapeutic principles across and within jurisdictions indicate that the court system is just ‘mellowing’, or is it a system in crisis?<sup>21</sup> Is the emergence of the drug court phenomenon (for example) evidence of an evolving adversarial system or of a withering or dying adversarial system?

In response to these questions, this thesis asks whether a significant adoption of therapeutic jurisprudence principles and practices in mainstream courts would instigate, or even require, a shift away from the adversarial paradigm that currently forms the foundation of the justice system to a therapeutic paradigm (which would incorporate, but not necessarily be limited to, principles of therapeutic jurisprudence). Or, alternatively, whether therapeutic jurisprudence reforms are in fact compatible with, and hence able to be made explicable by, adversarialism.<sup>22</sup>

This thesis argues that adversarialism cannot explain some key therapeutic jurisprudence principles and reforms and that, unlike a posited

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<sup>20</sup> Such as this assertion from Freiberg:

My proposition is that the development of therapeutic jurisprudence since the late 1980s and non-adversarial justice over the last decade, have the potential to transform the justice system ... My thesis is that whereas psychiatry, psychology and law tended to focus on bringing the perspectives of different disciplines to bear on a problem such as the treatment of offenders, therapeutic jurisprudence and non-adversarial justice have, and can lead to, institutional transformation: not just making the courts work better but changing the justice system itself.

Arie Freiberg, ‘Psychiatry, Psychology and Non-Adversarial Justice: From Integration to Transformation’ (Faculty of Law, Monash University Research Paper No 2010/8, 2010) 4.

<sup>21</sup> ‘Crisis’ in the sense of a paradigm that is increasingly unable to explain phenomena, events or developments within a field or discipline. This is explained in much greater depth in Chapter 2.

<sup>22</sup> The related normative question of whether a paradigm shift is not *required*, but may in fact be *preferable* is not a significant focus of this thesis. An answer to that question would involve assessing a very wide range of policy factors beyond the scope of the thesis.

therapeutic paradigm, the adversarial paradigm is unable to solve a number of intractable legal and social problems that represent intrinsic failings in our current approach to law and order.<sup>23</sup> If adversarialism cannot explain these principles and reforms, it cannot exclude therapeutic exemplars from residing within law's disciplinary paradigm.

## **1.2 Why an Examination of the Relationship Between Adversarialism and Therapeutic Jurisprudence Is Important**

The most significant implication of the examination this thesis undertakes of the relationship between therapeutic jurisprudence and adversarialism is that they are incommensurable. This is because they are either themselves competing paradigms, or because therapeutic jurisprudence is part of a wider non-adversarial paradigm, which is itself incommensurable with adversarialism. The consequences of this purported incommensurability will also be analysed.

If a shift from an adversarial to a therapeutic or non-adversarial paradigm is required to resolve this incommensurability, all stakeholders will need to be aware of which elements of the adversarial system may be retained and which will need to eventually be jettisoned.<sup>24</sup> If only incremental

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<sup>23</sup> Such as recidivism based on substance addition and abuse or gambling abuse, family and domestic violence, frivolous and vexatious litigation, criminal conduct and civil litigation linked to mental health issues, indigenous over-representation in the criminal justice system, inadequate access to justice for the poor or marginalised, critically low levels of public confidence in the judiciary, the legal profession and the courts, increasing levels of juvenile crime and increasing prison populations. Many, and perhaps all of these problems, are the targets of therapeutic- and solutions-focused innovations inspired by therapeutic jurisprudence.

<sup>24</sup> This is not to suggest that a fundamental restructuring of the justice system would need to occur or that changes that are required could not be facilitated organically. Rapid change is almost certainly impossible. The UK Phillips Commission of 1981, investigating possible amendments to adversarial criminal trials, noted that converting Britain's judicial system to one that was basically inquisitorial rather than adversarial would have effects that were so fundamental 'upon institutions that had taken centuries to build that it would

changes are required (which do not include what will later in the thesis be referred to as ‘paradigmatic exemplars’), in order to resolve the incommensurability or to allow significant migration of therapeutic jurisprudence principles into the mainstream, then that may have serious consequences for the longevity of therapeutic jurisprudence as an influence on the court system.<sup>25</sup>

A clarification of the theoretical and conceptual relationship between adversarialism and therapeutic jurisprudence would have important implications for our understanding of the evolving judicial role in mainstream courts. The most important of these implications have not yet been significantly explored by the academy, the judiciary or the legal profession.<sup>26</sup>

### 1.3 Theoretical Background

An important function of this thesis, as foreshadowed above, is to remedy the significant lack of rigour in addressing the nature of paradigms and paradigm shifts in the relevant legal literature. The critical methodological approach that will be used to achieve this, and to clear up any confusion

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be impossible on political and practical grounds’: Royal Commission on Criminal Procedure, *Report*, Cmnd 8092 (1981) [1.8].

<sup>25</sup> In Chapter 2 of the thesis, for example, I examine the assertion of Rottman (and others) that the long term fate of therapeutic jurisprudence in the courts depends on its migration from the specialist courts to the larger ‘trial court system’. This is due in part to the reality that court administrators and funding providers are loathe to fragment operations, jurisdiction and resources into too many specialised divisions: Rottman, above n 15. Several commentators express concerns that therapeutic jurisprudence may be seen as simply the latest juristic fad. At a broader level, a significant danger of a fading of therapeutic jurisprudence as a mechanism for reform and innovation could be a continued lack of a methodological and theoretical basis for fundamental and widespread law and justice reform.

<sup>26</sup> There is a well-recognised and significant lack of jurisprudential analysis, in the literature, of the role and meaning of therapeutic jurisprudence in the fundamental structure of the justice system.

as a result of the terms being used colloquially or casually<sup>27</sup> rather than analytically, will be that pioneered and developed by philosopher of science Thomas Kuhn.

The colloquial use of terms such as ‘paradigm’ and ‘paradigm shift’ are a significant confounding factor, in the absence of a clear, theoretical understanding of their meaning in scholarship, especially as applied to the social sciences and humanities. Such colloquial use tends to polarise opinion and create misconceptions as to what is expected of a paradigm and as to how much of a threat a purported new paradigm presents to the existing order within a professional discipline and/or a field of research. Despite colloquial use, analytical assumptions are, nevertheless, being made in the literature on the grounds of perceived or purported paradigm shifts. Although Freiberg, for example, uses the concept of a paradigm in a quite simple and general way in his works cited above, he concludes that a shifting paradigm requires ‘a fundamental re-examination of the operation of the courts’.<sup>28</sup>

This thesis will attempt to redress the current lack of rigour in the theoretical discourse by subjecting the contemporary debates about the nature and functions of the criminal justice system, within the therapeutic jurisprudence literature (and the literature of its critics), to a Kuhnian analysis. Specifically, it will use Kuhn’s articulation of the theory and dynamics of the paradigm shift<sup>29</sup> to seek a clear statement of the relationship between adversarialism and therapeutic jurisprudence.

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<sup>27</sup> This is not a phenomenon confined only to therapeutic jurisprudence scholarship. A search of the AGIS Legal Publications Database returned 106 hits for articles containing a reference to ‘paradigm’ but 0 hits for those containing the words ‘Thomas Kuhn’.

<sup>28</sup> Many examples of the colloquial use of the terms in the relevant literature will be cited and discussed in Chapter 2.

<sup>29</sup> Thomas Kuhn, *The Structure of Scientific Revolutions* (3<sup>rd</sup> ed, 1996), referred to as SSR, and as revised and expanded upon by both Kuhn in his later work and by social science researchers and legal theory scholars who attempt to adapt the concept(s) to other disciplines.



Apart from the relatively brief examination undertaken by Stobbs, as cited above, such an analysis has not previously been attempted, despite the frequency with which the paradigm concept is referred to in the therapeutic jurisprudence, and non-adversarial, literature.<sup>30</sup> This is not necessarily a fault on the part of researchers, but it has certainly, up until now, been a missed opportunity. The results of this analysis will provide practitioners and academics with a clearer picture of the nature of the relationship between adversarialism and therapeutic jurisprudence, which is currently murky. If therapeutic jurisprudence practices are fully consistent with the current adversarial paradigm, then migration of these practices from specialist courts to mainstream courts should be relatively uncontroversial and not in need of further jurisprudential justification.

If, however, there are paradigmatic inconsistencies between therapeutic jurisprudence practices and the adversarial paradigm, then there is a need to investigate whether this poses significant limits on how much migration can occur or whether the increasing level of migration is an indication of a paradigm shift at all. A Kuhnian assessment of the relationship between the two will also indicate the level of any incommensurability between them, which would have significant implications for how both therapeutic jurisprudence advocates and those who oppose it on adversarial grounds can meaningfully communicate. This is discussed in depth in Chapter 6.

The implications of this research for legal professionals are that if there is indeed a shift away from an adversarial paradigm, then they can expect to experience an accelerating demand for skills and knowledge that are not usually in demand in adversarial proceedings. As Clarke and Neuhard observe: 'For traditional lawyers, work in problem solving courts can require a difficult shift in attitude and advocacy strategy around what it

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<sup>30</sup> This could well be because relatively few academics and legal commentators have more than a rudimentary familiarity with the body of work that espouses and analyses the Kuhnian paradigm shift, and are therefore unaware of both the valuable theoretical insights and practical tools it offers.

means to provide 'counsel'.<sup>31</sup> Legal educators will also need to make significant changes to their curriculum.<sup>32</sup> Additionally, law makers will need to consider significant changes to legislation that regulates everything from the rules of evidence and court procedure to the roles of, and ethical requirements that apply to, judges and lawyers.<sup>33</sup>

This thesis will ultimately assert and defend the conclusion, in Chapter 6, that the criminal courts (and perhaps the criminal justice system as a whole) are in fact in a state of disciplinary crisis, in the sense meant by Kuhn, and that the resolution of this crisis is necessary in order to validate any fundamentally therapeutic role for judges in mainstream criminal courts. Without going through such a disciplinary crisis, no paradigm shift is possible and hence any significant therapeutic (or indeed non-adversarial) roles for judges (such as those proposed by Wexler, Winick, Freiberg, King, Daicoff and others) would continue to be uncertain and subject to continued staunch criticism from those who are opposed to it. The Kuhnian method provides the best, and possibly only, credible

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<sup>31</sup> Cait Clarke and James Neuhat, 'From Day One: Who's in Control When Problem Solving and Client Centred Sentencing Take Centre Stage?' 29(11) *NYU Review of Law and Social Change* 11.

<sup>32</sup> There is an increasing body of literature that discusses how legal education may need to evolve to cater for a changed legal paradigm. See, eg, David Wexler, 'Therapeutic Jurisprudence and Legal Education: Where Do We Go From Here?' (2002) 71 *Revista Juridica Universidad de Puerto Rico* 177.

<sup>33</sup> Much work is already being done in relation to exploring the changed nature of the judicial role pursuant to a therapeutic or non-adversarial paradigm. King observes that courts will be characterised by:

increased interaction between the judicial officer, participants, court team members and community members. Judging in these contexts is often informed by therapeutic jurisprudence principles ... [and] that, properly done, judging in these courts and applying therapeutic jurisprudence in judging in mainstream lists does not violate the judicial function or judicial values of independence, impartiality and integrity ... [and that] an ethic of care should not only underlie these newer forms of judging but also all other forms of judging.

Michael King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 *Journal of Judicial Administration* 133.

method for detecting and analysing incommensurability and paradigm shifts.

Wexler, in his foreword to King, Freiberg et al, both foreshadows the existence of a disciplinary incommensurability in law and highlights the danger of such a schism:

One can question the value of an argument culture without calling into question the indisputable value of argumentation as a crucial component of disciplined thinking. Similarly, one can question the value of a legal culture of adversarialism without calling into question the value—indeed, sometimes even the therapeutic value of adversarial litigation as a crucial tool of the lawyer. The problem, instead, is with a legal culture that privileges argumentation which is dismissive of other approaches, that is at the heart of [non-adversarial justice in Australia].<sup>34</sup>

## 1.4 The Value of a Kuhnian Analysis

Kuhn's theory of the paradigm shift is fundamentally concerned with the nature and dynamics of disciplinary change. He seeks to understand and explain why disciplines, or fields of study, change their core beliefs and practices over time, thus the title of his major work: *The Structure of Scientific Revolutions* (SSR). This thesis is concerned with extant, purported and possible changes in the legal system and specifically with changes in the roles of the judiciary and the courts at the most fundamental levels. To that end, and given the very frequent referencing of Kuhn in literature that focuses on change in the social sciences and humanities disciplines, his method is a good fit for this project.

There is an extensive, and still growing body of literature, that seeks to unpack the real meaning of Kuhn, to trash or laud his theory of the paradigm, and to extend the theory. This thesis is not greatly concerned with that agenda. Although the thesis does devote some necessary time to explicating and justifying the credibility and utility of the Kuhnian paradigm

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<sup>34</sup> Michael King, Arie Freiberg, Becky Batagol and Ross Hyams *Non-Adversarial Justice* (2009).

shift, in order to set the conceptual scene for testing its applicability to legal systems, it makes no attempt to either significantly critique or defend it. Even if Kuhn's explanations for how disciplines change and evolve are eventually rejected or displaced, testing the hypothesis that adversarialism and therapeutic jurisprudence are competing and incommensurable paradigms, in the Kuhnian sense, will help bring into focus the theoretical and conceptual differences between the two.<sup>35</sup>

Kuhn's work is among that most cited by scholars in the social sciences and the humanities.<sup>36</sup> The applicability of his theory of paradigm shift and its influence on the social sciences and other fields outside of the natural sciences is virtually indisputable (although there remains the important task of establishing such applicability in the context of jurisprudence and to systems of law) is dealt with in Chapter 3 of the thesis.<sup>37</sup> I do not begin with the assumption, as most of the literature does, that the concept of a paradigm has applicability outside of the natural sciences<sup>38</sup> or to law in particular, but I make arguments for and defend that claim.

Kuhn's historic assertion is that acceptance of the central and defining theories and practices within a discipline are not simply a matter of evidence-based analysis, but largely dependent upon social, cultural and political forces within the discipline itself. This means that what is most

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<sup>35</sup> This means that I make no normative assumptions as to the contemporary or future role of either therapeutic jurisprudence or of adversarialism. Advocacy for any particular system is not a function of this work., despite the fact that I will make reference to what I believe are some powerfully utilitarian elements of both.

<sup>36</sup> Kathleen Loving and William Cobern, 'Invoking Thomas Kuhn: What Citation Analysis Reveals about Science Education' (2006) 9 *Science Education* 187–206.

<sup>37</sup> Kuhn's work has also given rise to an entire new discipline: the Sociology of Science. See Barry Barnes, *TS Kuhn and Social Science* (1982).

<sup>38</sup> By natural sciences I mean those that are methodologically committed to the scientific method and rely for their data, almost exclusively, on observations and measurements of phenomena in the physical world. As will be discussed in some detail in chapters 2 and 3, Kuhn was initially of the view that the theory of paradigm shift had little to offer disciplines outside of the natural or 'hard' sciences.

critical to how a discipline defines its work is the vocational education, socialisation and consensus of members within that discipline and not a set of currently 'proven' yet potentially falsifiable hypotheses. What the members of a discipline believe, according to Kuhn, is largely determined by internal consensus and a shared worldview.<sup>39</sup> Fundamental changes within a discipline rarely occur as sudden revolutions in response to some crucial new discoveries, but as long-term reactions to the accumulation of what increasing numbers of practitioner see as anomalies (or problems) based on their shared worldviews.

Kuhn's views caused wide-ranging and heated debate within the natural sciences. These disciplines have tended to see themselves as definitively Cartesian and positivist by nature. The very idea that science may develop as a result of anything other than totally objective and rational assessments of observations and fact has given rise to significant neuroses<sup>40</sup> within the science academy, even to the extent of spawning the so-called 'Science Wars' in the US in the 1990s.

The social sciences and the humanities (among which I will situate both the study and practice of law) are, perhaps unsurprisingly, less sensitive about being labelled subjective, or about assertions that rationality is not a simple construct. For that reason, Kuhn initially reacted with surprise that the greatest influence of his work was within the social sciences. He had

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<sup>39</sup> This is in strong opposition to what other philosophers of science, and many lay people, believe—that is, that practitioners within a certain discipline base their shared beliefs solely on empirical testing and analysis of data. This difference has largely been resolved in Kuhn's favour—as will be discussed in the latter sections of Chapter 2.

<sup>40</sup> A full and detailed analysis of the nature and extent of this neurosis can be found in Nicholas Maxwell, *Is Science Neurotic?* (2004). Maxwell's view is that:

specialisation, and the resulting fragmentation of academia, has resulted in a situation in which hardly anyone takes responsibility for the overall ideals, the overall aims and methods, of academic inquiry. Academics, these days, are specialists, furiously trying to keep abreast of developments in their own specialist fields.

always assumed that the disciplines outside of the natural sciences revelled in fundamental disagreement about their core beliefs.<sup>41</sup>

Although there is no doubt that disagreement about fundamental values, methods and objectives have been, and continue to be, central to jurisprudence (and to a lesser extent the practice of law), the social scientists (jurists among them) are enamoured with the paradigm concept. It is an unsurpassed tool for shining a critical light on the relationships between competing theories and approaches within a discipline, as this thesis hopes to demonstrate.

## **1.5 Vagueness in the Current Theoretical Context**

There are conflicting agendas and trajectories within the literature as to the need for, and value of, engaging in a theoretical examination of therapeutic jurisprudence. Some commentators believe that a deeper theoretical analysis is essential as a means of paving the way for a take-up of therapeutic principles in the mainstream courts,<sup>42</sup> while others fear that advocating too strong a theoretical basis could marginalise the movement as attempting to be too broadly reformist and scare away

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<sup>41</sup> Kuhn's academic and intellectual roots were in physics and his fascination with the apparently strict social order within the natural sciences, to a large extent, sparked his interest in the concept of the paradigm shift. When, in mid career, he spent a year as a research fellow at the Centre for Advanced Study in the Behavioural Sciences at Stanford University, he found it startling to discover that the leading social scientists in many fields seemed to disagree with each other about such core issues as the legitimate objects of study, the most credible methodologies and the criteria for evaluating research output. His assumption that this meant there were no conceptual paradigms, susceptible to revolution, at the heart of a social science discipline was a view he later ameliorated and that I reject in Chapter 2 of the thesis.

<sup>42</sup> See, eg, Richard Wiener, Bruce J Winick et al, 'A Testable Theory of Problem Solving Courts: Avoiding Past Empirical and Legal Failures' (2010) 33 *International Journal of Law and Psychiatry* 417; Scott Senjo and Leslie Leip, 'Testing and Developing Theory in Drug Court: A Four Part Logit Model to Predict Program Completion' (March 2001) *Criminal Justice Policy Review* 66.

potential ‘converts’ or lead to unacceptable misconceptions as to its principles and methods.<sup>43</sup> Still other commentators, as discussed in Chapter 5, seem to advocate both of these positions over time. This has added to the murkiness that I claimed above characterises the perceived relationship between therapeutic jurisprudence and adversarialism.

Downplaying the jurisprudential status of a particular approach to law and legal practice often goes hand-in-hand with an effort to characterise that approach as a lens. Under that sort of analysis, therapeutic jurisprudence would not be conceived of as a work of jurisprudence in itself, but simply as a tool for improving techniques and practices within the existing adversarial system. There have been significant efforts to characterise therapeutic jurisprudence as a lens. The resulting reluctance to explore its potential jurisprudential parameters has not been without its detractors.<sup>44</sup>

Neither Freiberg nor the other scholars referred to above who perceive, or call for, a paradigm shift in the criminal justice system have engaged in any thorough or rigorous theoretical consideration of what is meant by, or involved in, a paradigm shift, beyond use of the term as a convenient academic shorthand for describing and hypothesising some important and fundamental, but as yet uncertain, changes within a discipline.

There are threads of concern apparent in the literature of therapeutic jurisprudence being misinterpreted, misapplied and too broadly conceptualised, to the extent that it might be dismissed as some sort of

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<sup>43</sup> Most notably Ian Freckelton, ‘Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence’ (2006) 30(2) *Thomas Jefferson Law Review* 575.

<sup>44</sup> Satin opines that ‘[m]aybe until now it was enough for you to claim that TJ is “only” a sort of lens, “only” an additional way of looking at the law that’s in the end deferential to the adversary/mechanistic justice system, and leave it at that (with allies like Prof. Freckelton meanwhile signifying loyalty to the system by condemning “New Age” idealists in the TJ community)’; Mark Satin, ‘Healing First: Time for the US Justice System to Get Less Mechanistic and More Compassionate’ (2008) 119 *Radical Middle Newsletter*.

vague *panacea* or as an overambitious fringe of legal theory, which seems to have been the perceived fate of any number of brands of jurisprudence over recent decades. These are the theories, perspectives or movements that Freiberg has most recently described as the ‘law ands’—such as law and society, law and psychology, law and literature, law and economics, law and feminism and law and critical legal studies.<sup>45</sup>

These ‘law and’ approaches to law generally have their genesis in the American Realist tradition<sup>46</sup> of the 1930s, which took a general view that law did not exist as a body of rules in a social, political or economic vacuum but had an important role to play in shaping and working with those other (extra-legal) contexts.<sup>47</sup> There is a thread of consequentialism flowing through these movements that takes the view that the social and wider effects of laws are important to determining their validity, rather than the traditional formalist view that what characterises good and valid laws are internal logic and consistency and the legitimacy of the source (such as legislatures and courts). Theories, movements and perspectives on law that are seen as seeking reforms that are too radical, political or ambitious attract the sort of attention that some within the therapeutic jurisprudence movement want to avoid. It is a movement that has strong ties with practicing judges and lawyers who are very conscious of maintaining the credibility of the movement as practice oriented and as not being perceived as in too much overt conflict with legal and political orthodoxy.

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<sup>45</sup> The discussion of the ‘law ands’ and their fate began with Marc Galanter and Mark Edwards, ‘Introduction: The Path of the Law ANDS’ (1997) *Wisconsin Law Review* 375.

<sup>46</sup> Most often associated with the work of jurists such as Oliver Wendell Holmes, Jerome Frank and Karl Llewelyn. The realist tradition, and to some extent therapeutic jurisprudence and the wider framework of the ‘Comprehensive Law Movement’, place strong emphasis on the *indeterminacy of law* (meaning that judicial decisions and the solutions to legal problems are often the result of extra-legal factors such as subjective judicial discretion rather than a simple application of rules), on law being approached in an *interdisciplinary* way and on *instrumentalism*, ie, that law should be a tool for social action.

<sup>47</sup> Morton White, *Social Thought in America: The Revolt against Formalism* (1949).



Law is an inherently conservative discipline. This phenomenon is dealt with in detail in Chapter 3.

Considering the extensive body of knowledge and research concerning the nature of paradigms and paradigm shifts that exists in the theoretical writings across a wide range of other disciplines, there is a disappointing reluctance to engage with the concepts generally in law and jurisprudence. This reluctance is probably due in large part to the distrust that has historically characterised the relationship between the professional and academic arms of the legal and justice system. Legal academics and theorists are often seen as out-of-touch and overly concerned with factors that are seen as too removed from the day-to-day practice of law to be of much practical use. There is sometimes an undercurrent of fear, on the part of academic lawyers, that their work and suggestions might be dismissed or marginalised where it is seen as attempting to be too prescriptive or ambitious in scale. This is particularly so when the academic is also closely connected to the professions, or may be working within both the profession and the academy. Freckelton articulates this fear in this way:

[I]n the maturation phase of therapeutic jurisprudence, those who identify its advantages have an intellectual responsibility to be clear about the parameters and limits of therapeutic jurisprudence. This will reduce its invocation in ways that will bring it into disrepute and result in outcomes inconsistent with its values.<sup>48</sup>

This reluctance to engage with both the theoretical structure of therapeutic jurisprudence and the paradigm concept has risks and negative consequences that this thesis seeks to redress. The main risk of any failure to engage with a proper analysis of the status of a discipline (including law), in terms of paradigms, is that there may be no real attempt to define the legitimate problems and methods of a field for current and succeeding generations of researchers and practitioners. In the absence of that process, what is left to inform the mind-set of researchers and to

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<sup>48</sup> Freckelton, above n 43, 576.

characterise the theoretical framework of a discipline are the largely ad hoc and somewhat taken for granted assertions of those commentators who merely dabble in theoretical analysis. It is possible to characterise Freiberg's use of the paradigm terminology and the wider use of the somewhat sterile and two-dimensional model of an adversarial/non-adversarial continuum in this way.<sup>49</sup> However, we can also characterise it as a conceptual segue into the research agenda of this thesis.

An associated risk is that avoiding the examination of disciplinary paradigms can lead to the assumption that finding solutions to any problem within a discipline is basically guaranteed within the parameters of the existing paradigm by simply moving the pieces around according to the rules of that existing paradigm. So that if, for example, we were to decide that the problem of recidivism among drug-addicted offenders was an intractable problem for the adversarial justice system (as many therapeutic jurisprudence scholars do), we would be obligated to look for solutions that make use of a court with amended rules of adversarial procedure, and be precluded from designing a court where adversarial rules and principles were actually *subordinate* to non-adversarial rules and principles. Today's drug courts are still (legislatively) courts at their core, not collaborative institutions for addressing the law and order, and social problems caused by drug addiction.

Avoiding an analysis of the existing and emerging paradigms within a discipline, therefore, may tend to distance and downplay suggestions of a discipline in crisis, in which intractable problems remain intractable, and in which progress is unnecessarily incremental. Only where problems are allowed to be canvassed as serious anomalies rather than as speed bumps (or as 'problems' rather than 'puzzles', as Kuhn expresses it), can there be a legitimate normative discourse about the future direction of a

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<sup>49</sup> I describe this as a 'continuum' model because conceiving of legal practices that go through a gradual transition from one condition to a different condition without any fundamental (paradigmatic) changes seems to deny that there is a meaningful, *defining* core of principle that could either validate or invalidate a practice.

discipline or field.<sup>50</sup> Even if the analysis of paradigms reveals that there are not a significant number of anomalies and, therefore, no real disciplinary crisis, that in itself is an intrinsically valuable exercise.<sup>51</sup>

If such an analysis does, however, demonstrate the existence of a disciplinary crisis, then it can result in the beginnings of a conversation about a valid alternative paradigm that might unite the revolutionary threads that have arisen in response to that crisis. I will assert, in fact, that such a conversation has already started but that it is tentative, vague and unfocused.<sup>52</sup> Thus, by going beyond the use of 'paradigm' as a convenient academic shorthand, I hope to remedy some of that vagueness.

Taking a Kuhnian approach to analysing the relationship between therapeutic jurisprudence and the current adversarial paradigm is also a credible way of highlighting the theoretical limits of the movement. This is because the analysis progresses according to a clear conceptual framework and is a method that has been used successfully to explore change in the hard sciences, in the social sciences and in other fields within the humanities. It is a method that goes beyond a simple review of literature and a search for consensus among commentators.

There are at least three other reasons why an analysis of the theoretical limits of therapeutic jurisprudence, especially as it relates to the adversarial paradigm, is necessary. First, if we are satisfied to portray therapeutic jurisprudence as a lens, which does no more than suggest secondary and ancillary adjustments to court procedure, then the motivation for attempting to give it a full and coherent theoretical basis and explanation may never develop. There is no doubt that therapeutic jurisprudence does not have a properly explored theoretical basis,

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<sup>50</sup> This claim is pursued in more depth in chapters 2 and 3.

<sup>51</sup> Such alternative conclusion as to the relationship between therapeutic jurisprudence and adversarialism will be discussed in Chapter 6.

<sup>52</sup> As evidenced by the vagueness of such umbrella terms as 'non-adversarial' or 'post-adversarial'.

regardless of whether we concede that it is itself 'a theory'.<sup>53</sup> The typical definitions of therapeutic jurisprudence are usually quite pragmatic and centre on the avoidance of anti-therapeutic consequences and the promotion of therapeutic consequences for those involved in a legal dispute. The current definitions avoid theoretical content and construct, simply because the work needed to fund that content has not been undertaken. Ironically there is no comprehensive and coherent theoretical basis that we can point to that informs the adversarial paradigm either. In Chapter 4, I will argue that adversarialism is the result of a chaotic series of ad hoc responses to social and political tensions, which evolved as a set of compromises rather than as an identifiable body of theory and practice. If that can be established, then the claim of adversarialism to paradigm status can be seen as organic and opportunistic, rather than the result of any process akin to the rigour of the scientific method—and, therefore, is all the more vulnerable to Kuhnian disciplinary crises.

Second, if therapeutic jurisprudence cannot be established as part of an alternative therapeutic (or non-adversarial, or post-adversarial or problem-solving) paradigm, then it is less likely to achieve a substantial and sustainable penetration of the courts and legal practice; it will only ever inform the work of its strongest advocates, and not the mainstream. As will be explained in Chapter 2, a paradigm provides the exemplars against which the validity of practices within a discipline are assessed. This fear resonates throughout the literature. Freiberg has pointed out that unless there is a *significant culture change* in the judiciary, a posting in the therapeutic jurisdiction will probably always be seen as a form of punishment or as a place to put those who are seen as a bit 'soft'.<sup>54</sup>

Third, and perhaps most importantly, if therapeutic jurisprudence does not belong to a different paradigm, it will only ever be (as Kuhn tells us) a

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<sup>53</sup> Divergent opinions from within the movement itself about therapeutic jurisprudence's status as a theory are contrasted in Chapter 6.

<sup>54</sup> Freiberg, above n 1, 19.

puzzle solver, rather than a problem solver. When a discipline is working within an accepted paradigm, practitioners only ever have to solve puzzles (according to Kuhn)—meaning that their work involves using the tools of *that* paradigm to find solutions. When a puzzle seems intractable then it becomes a problem, not just for the practitioners, but for the paradigm itself. The relative strengths of adversarialism and therapeutic jurisprudence as Kuhnian problem solvers will be assessed in chapters 5 and 6.

We might say that the intractable problem that offender recidivism poses for adversarial criminal courts is a good example of a puzzle becoming a problem. It has taken centuries for non-adversarial approaches to repeat offending to get some traction and now that they have, they are often seen as being outside the paradigm. We even give them outsider names, such as ‘problem-solving courts’ or ‘diversion programs’—we cannot simply call them ‘courts’ and allow them to solve problems.

There is no doubt that adversarialism constitutes a Kuhnian paradigm (as will be established in Chapter 4) or that there is strong resistance to the emergence of any competing paradigms at the highest and deepest levels of the legal profession.

## **1.6 The Theoretical Aims of the Thesis**

The position I will construct and defend in this thesis is that therapeutic jurisprudence is, in fact, part of a post-adversarial paradigm (which I will argue in Chapter 6 can be characterised as a therapeutic paradigm),<sup>55</sup> and it is, therefore, incompatible (or as Kuhn would assert, ‘incommensurable’) with adversarialism. I will further argue that despite this incommensurability, therapeutic jurisprudence can continue to migrate to

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<sup>55</sup> ‘Non-adversarial’ is not a precise enough description to represent a paradigm (since it defines what it is not rather than what it is). I prefer the use of the label ‘therapeutic’ paradigm for reasons that will become obvious as the thesis develops.

the legal mainstream, but that this migration will always be significantly limited by adversarial principles until the paradigmatic core of exemplars, which defines legal and judicial practice, is modified to contain some therapeutic principles. If these therapeutic exemplars are considered to be non-adversarial, then we will be able to validly claim that a paradigm shift in the law has occurred.

The most important implication of paradigmatic incommensurability would be that we can only allow judges in Australian courts to adopt a role that is paradigmatically therapeutic (rather than paradigmatically adjudicative) and that is, therefore, *theoretically defensible*, if there is a paradigm shift in the law in the Kuhnian sense (rather than in some generic or colloquial sense). The corollary being that if therapeutic jurisprudence is not part of some other (non-adversarial) paradigm, then it must comply with the requirements of the adversarial paradigm, which prescribes that the role of a judge must always be primarily adjudicative. The paramountcy of the adjudicative function in the adversarial paradigm will be explored and explained in Chapter 4.

The contrary view, that the adversarial (adjudicative) function of courts and judges must always be what fundamentally defines them, even if they engage in some functions that appear to be less adversarial, I will identify as the central theoretical plank of the current adversarial paradigm. I will discuss the claim, in Chapter 4, that it is from this adversarial function that they derive their validity.<sup>56</sup> The view that in order to be a valid statutory and constitutional institution, a court can only adopt a therapeutic function that is consistent with, and subordinate to, adjudication (adversarialism) is deeply ingrained in our current jurisprudential worldview and is one that

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<sup>56</sup> I am using 'thesis' and 'antithesis' here in the sense meant by Hegel, and commonly used to describe the 'Hegelian dialectic' as a method of argument. In the Hegelian dialectic, the thesis is some intellectual propositions and the antithesis is simply the negation of that thesis, a reaction to the proposition. The synthesis solves the conflict between the thesis and antithesis by reconciling their common truths and forming a new proposition.

resonates through extrajudicial writing in particular. A number of these strong adversarial objections to the evolution of a therapeutic paradigm will be examined in the thesis, particularly in chapters 4 and 5.

Anthony Mason, former Chief Justice of the High Court of Australia, articulates just this antithetical position in asking:

Have we come so far that we can now say that, in Australia, trials are 'a mechanism of valued but last resort'? Such a statement seems to suggest that court adjudication is simply a back-stop to be invoked when all other expedients fail. That suggestion is scarcely consistent with the separation of powers and the vesting by the Australian Constitution of federal judicial power in Ch III courts. One can understand the view that other modes of dispute resolution are *incidental* to the exercise of judicial power ... But to treat court adjudication as if it is something less than the main game ... is to turn constitutional tradition on its head.

Courts are courts; they are not general service providers who cater for 'clients' or 'customers' rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their 'clients' and their 'customers' will regard them, correctly in my view, as something inferior to a court.<sup>57</sup>

This polarising theoretical dimension to a Kuhnian analysis of disciplinary change is certainly reflected in some of the harsher criticisms of therapeutic jurisprudence. This thesis seeks not to gloss over or downplay this polarisation, but to clearly delineate it and to explain why it is important for the future survival and evolution of therapeutic jurisprudence beyond the specialist jurisdictions.

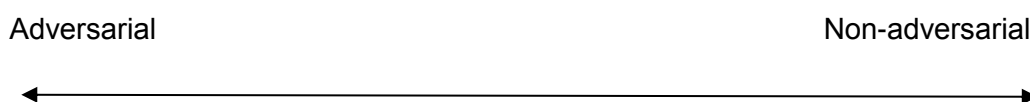
## **1.7 Direct Comparison or Meta-Analysis?**

Freiberg, Wexler and other leading commentators in the field often prefer to emphasise the practical, rather than theoretical, importance of therapeutic jurisprudence, in an attempt to further encourage the creation

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<sup>57</sup> Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th Annual AIJA Conference, Adelaide, Spring 1999) 5  
<<http://www.aija.org.au/online/mason.rtf>>.

of tools and methods for assessing and remedying the purported anti-therapeutic effects<sup>58</sup> of legal rules, roles, institutions and processes on all those involved. Consequently, it is much more common to see principles or practices described as non-adversarial rather than therapeutic, and for therapeutic jurisprudence practices to be conceptualised as existing on a continuum demarcated by adversarial and non-adversarial poles.



**Figure 1.1: Adversarialism and non-adversarialism on a continuum**

This continuum is a useful model to contrast with one that places therapeutic jurisprudence within a separate paradigm. Allowing the existence of a continuum where neither of the labels ‘adversarial’ nor ‘non-adversarial’ are fundamentally definitive of some legal practice seems to deny paradigm status to both.

To claim that a legal practice or institution (such as a court) can be both a bit adversarial and a bit non-adversarial, while probably quite true on a superficial or colloquial (perhaps phenotypical) level, can add to the confusion about what a paradigm actually is. That confusion arises from conflating two senses of ‘paradigm’. One sense is the casual use made of the term by most academics in the humanities and social sciences; the other is the more rigorous and theoretically useful sense as proposed by Kuhn.

The contrast between these two conceptions of what a paradigm is—and of the respective models they generate—has not been dealt with or

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<sup>58</sup> An anti-therapeutic effect is said to be any effect that occurs as a result of a legal process that has a negative influence on the well-being of a person involved in the process. The lack of precision in explanations of exactly what constitutes an anti-therapeutic effect and who makes that assessment, has attracted some criticism for advocates of therapeutic jurisprudence, but this debate will be examined in more detail in Chapter 4.



reconciled in the relevant literature, and that will be an additional benefit of the work in this thesis. Namely, whether it is more valid to conceive of adversarialism and therapeutic jurisprudence as belonging to two incommensurable paradigms or as poles of a conceptual, legal and practical continuum. There have been some recent attempts to contrast the continuum model with one that assesses and describes adversarial processes with non-adversarial alternatives from an external, rather than lineal, perspective. These attempts are particularly useful for the purposes of this thesis when it comes to an analysis of the deeper practical implications of incommensurability, which I undertake in chapters 2 and 6, but they fall short of the depth of rigour that is involved in a Kuhnian analysis.

Chapter 5 of the thesis examines whether therapeutic jurisprudence is able to provide possible paradigmatic exemplars for the law (or for a 'juristic paradigm'), and for criminal court procedures in particular. The method of therapeutic jurisprudence is fundamentally interdisciplinary, in that it applies social sciences research, knowledge and practices to create:

an evidence-base that, conveyed through the theoretical framework of therapeutic jurisprudence, may have a gradually increasing influence on legal procedures, roles, and rules with particular reference to criminal justice. Studies are beginning to appear in which hypotheses generated from the convergence of these fields are being tested in court settings.<sup>59</sup>

Although there is not yet a single unifying philosophy, method or theoretical framework underpinning and connecting the various non-adversarial vectors and approaches to which therapeutic jurisprudence is related, progressing that agenda beyond establishing the relationship is not necessary for the purposes of this thesis.

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<sup>59</sup> James McGuire, 'Maintaining Change: Converging Legal and Psychological Initiatives in a Therapeutic Jurisprudence Framework' (2003) 4(2) *Western Criminology Review* 108.

So long as we can grant that there could be what I have referred to as a 'therapeutic paradigm' that would subsume the principles of therapeutic jurisprudence, that is all that is required to demonstrate that the adversarial paradigm may be incommensurable with those principles, in the sense meant by Kuhn. Some commentators, such as Dewhurst,<sup>60</sup> believe that the lack of a unifying theoretical framework underpinning the various non-adversarial approaches to law is a weaknesses, but as Kuhn has suggested, the contents or 'disciplinary matrix' of a new paradigm is not a totally new entity, but rather an extension of an existing one (see Figure 1.2).

Dewhurst rightly observes that most recent scholarly works on non-adversarial justice 'do not resolve the concern about how the developing vectors interface with the adversarial system'.<sup>61</sup> However, crucially, some influential recent scholarship seems to make the significant assumption that the full range of non-adversarial practices and principles can be placed on a conceptual continuum where these 'processes' are adversarial to either a greater or lesser extent. King et al assert, for example:

we prefer to conceive of adversarialism and non-adversarialism as a continuum, a sliding scale upon which various legal processes sit, with most processes combining aspects of adversarial and non-adversarial practice to varying degrees.<sup>62</sup>

The practical and pragmatic motivation for this sort of approach is understandable, but the problem with this analysis is that it seems to deny that there can be principles or practices within the legal system that are purely adversarial or indisputably non-adversarial. It avoids the need for a

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<sup>60</sup> Dale Dewhurst, 'Justice Foundations for the Comprehensive Law Movement' (2010) 33 *International Journal of Law and Psychiatry* 463.

<sup>61</sup> Ibid 464. He claims that '[w]hat is needed is a comprehensive and internally consistent super-system of norms; one that can be used to evaluate the adversarial system and the evolving vectors on an equal footing'. This has conceptual links to the discussion, in Chapter 6, about how a theoretical meta-language can allow judges and lawyers to act in both adversarial and non-adversarial roles, even if there is paradigmatic incommensurability between the two.

<sup>62</sup> King et al, above n 3, 5. I do not assert that this is a fully developed or inflexible position on the part of King and his fellow authors.

precise definition of adversarialism and, more importantly for the purposes of this thesis, precludes that our current legal system operates pursuant to an adversarial *paradigm*. If the two ontological states of adversarial and non-adversarial represent either ends of a continuum, then they cannot represent paradigms in the Kuhnian sense, since they would then be incommensurable. I do not assert that this is a fully developed or inflexible position on the part of King and his fellow authors, but it does provide an excellent foil against which to make Kuhnian comparisons, even if we simply take it as one possible characterisation of the relationship.

Dewhurst recognises the conceptual naivety in this notion of a continuum when he observes that:

With this lack of specificity in mind the next step of identifying the new vectors [as identified by Daicoff] as ‘non-adversarial’ becomes doubly problematic. That is: (a) since we cannot precisely say what the adversarial system is; (b) it makes it almost impossible to firmly claim that the new vectors are not it; and (c) this is compounded by the fact that the non-adversarial system can embrace elements from the adversarial end of the buffet and the adversarial system can embrace elements from the non-adversarial end of the buffet.<sup>63</sup>

Daicoff claims that a number of new, alternative or evolving approaches to law and legal practice<sup>64</sup> (including to the role of the judicial officer) represent a new law/justice paradigm that is an inevitable response to what she calls the tripartite crisis in the legal profession—namely, poor public confidence in the law, stress and depression among lawyers and decreasing professional standards.<sup>65</sup> The movement is comprehensive in that it is interdisciplinary, integrated, humanistic, restorative and

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<sup>63</sup> Dewhurst, above n 60, 464.

<sup>64</sup> Susan Daicoff, ‘Law as a Healing Profession: The “Comprehensive Law Movement”’ (2006) 6(1) *Pepperdine Dispute Resolution Law Journal*.

<sup>65</sup> This she says include ‘Rambo style litigation’, and ethically questionable conduct. Daicoff is also a psychologist and has written a seminal work on the links between the typical lawyer personality and the problems in the profession: Susan Daicoff, *Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* (2004).

therapeutic. Each ‘vector’ recognises that it is a function of law to act as an agent for positive interpersonal or individual change in some way (such as healing, wholeness and restoration).

This concern with extra-legal factors is something that most (if not all) adversarial processes seem to ignore, preclude or play down. Even where a court makes a decision based in part on factors other than a simple application of legal rules, the appeal to those factors is itself mandated or permitted pursuant to a formal legal rule, as is the enforcement of any adjudicatory consequences. In sentencing, for example, the social, demographic or physical environment of the offender may be relevant to the sentence, but only to the extent to which those factors are provided for in either legislation or common law.

If, as Daicoff and virtually all other commentators assert, the institutions and officers of the law ought to have access to vectors that address this wider conception of the extra-legal, then we are not looking at processes that are simply less adversarial, but fundamentally non-adversarial. A deeper analysis of the differences between a less adversarial and a non-adversarial paradigm will be undertaken in Chapter 3 in the discussion of juristic paradigms. To some extent, Dewhurst attempts such an analysis.<sup>66</sup> He articulates his main concern in this way:

Is there a common underlying philosophical foundation that can unite the vectors within the Comprehensive Law Movement while ensuring that they remain separate and vibrant movements in their own right?<sup>67</sup>

On one level his agenda converges with my own when he observes that:

the one concern with Daicoff’s [argument] is that it is a contradiction to claim that the new vectors operate simply as tools within legal practice but from a different paradigm. If they are truly operating from a different paradigm then the vectors are no longer

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<sup>66</sup> I interpret Dewhurst as in fundamental agreement with me that the application of external factors in law and legal practice can only be valid if they are internally justified and explicable. Hence the theme of this thesis that real migration of therapeutic principles into mainstream courts requires paradigm shift—the internal structures need redefining.

<sup>67</sup> Dewhurst, above n 60, 465.

simply tools of legal practice. Instead, if the new processes of the Comprehensive Law/Justice Movement are offering new paradigms then they must at least be critically engaged at the legal theory level if not at the legal order level.<sup>68</sup>

This is then, a strong focus of the thesis and one that I undertake in much more detail than Dewhurst. If a vector (such as therapeutic jurisprudence as characterised by Daicoff) is truly a lens that allows the observation and evaluation of a legal rule, practice or principle from a different perspective, then the value of that lens may well be reduced if it operates from within the adversarial system (or on the sort of continuum suggested by King, Freiberg et al). If we conceive of the use of a particular vector as an alternative to the adversarial system, then we are admitting that the adversarial system itself is inadequate. Dewhurst articulates it in this way:

[I]f we are dealing with choices between employing a particular vector as an alternative to the adversarial system, then a higher order norm is required. If our inquiry goes even higher, to question the validity of the legal theory itself, then a super-system of norms is mandatory.<sup>69</sup>

Dewhurst then proceeds to posit an Aristotelian natural law virtue theory of justice as a philosophical foundation for the comprehensive law/justice movement. He prefers to refer to the need for a 'Comprehensive Justice' movement, since his agenda is to focus on law and legal processes and institutions as part of a wider system that seeks to 'enable and sustain the material and social conditions that would enable each and every individual to achieve the highest level of human functioning that is consistent with a similar level of functioning for all'.<sup>70</sup>

Although I will argue in chapters 2 and 3 that there are important and necessary links between social and political worldviews (*Weltanschauung*)

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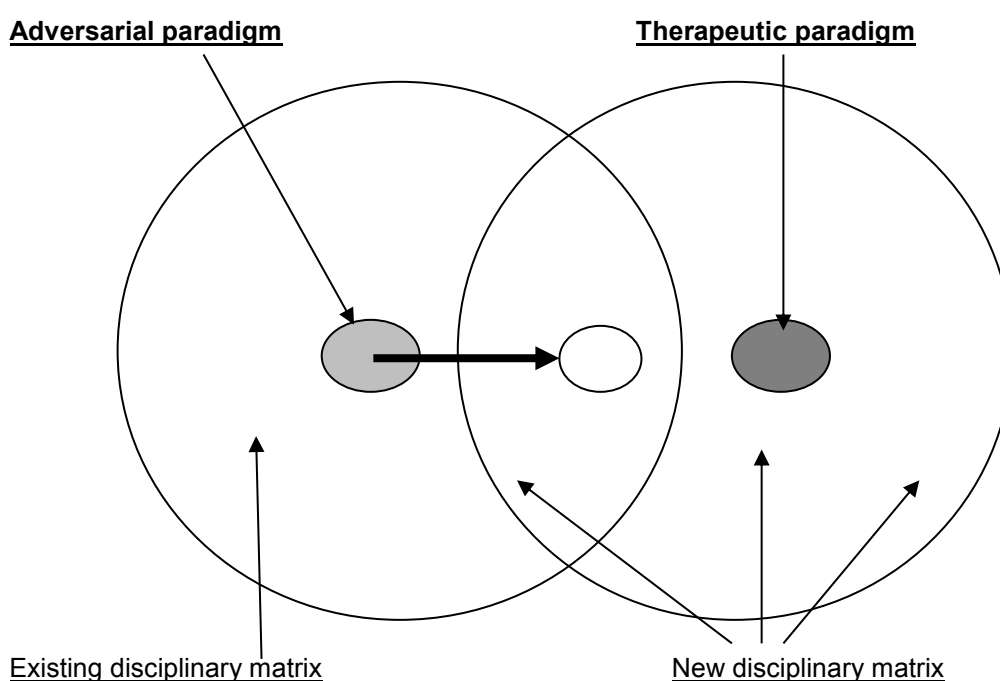
<sup>68</sup> Ibid 466.

<sup>69</sup> Ibid 467. This proposal of an external set of norms with which to assess various approaches to law is critiqued by Dworkin. Dworkin's views are considered in detail in Chapter 6. However, see Ronald Dworkin, *Justice for Hedgehogs* (2011) 402.

<sup>70</sup> Dewhurst, above n 60, 471, citing Farrelly and Sollum *Virtue Jurisprudence* (2008) 2.

and legal systems, this thesis is concerned with the links between adversarialism and therapeutic principles within the context of what I refer to as 'juristic paradigms', rather than positing the nature of some higher-order social paradigm based on some perceived basis for general human flourishing (such as Aristotelian virtue). To that extent, this current work is focused at least one level of abstraction lower than the Dewhurst agenda. A wider-ranging analysis is not necessary in order to test the Kuhnian commensurability of therapeutic jurisprudence with adversarialism.

The Kuhnian paradigm shift is a valuable template for examining both disciplinary change and for deconstructing the relationship between alternate juristic views at this level of abstraction. It does not conceive of such alternate views as residing within a continuum.



**Figure 1.2: Paradigmatic exemplars in a paradigm shift (existing paradigm becomes part of expanded disciplinary matrix)**

Figure 1.2 depicts a simplified overview of the paradigm shift according to Kuhn. In this model, a pre-paradigmatic disciplinary matrix evolves to include all the accepted rules, practices and protocols within a given field

or profession. As the discipline evolves and is subjected to formal study (and perhaps professional regulation), it caters for the education and socialisation of new practitioners. The core benchmarks or principles against which any new hypothesis or phenomenon is tested to determine whether it is a legitimate subject of study for the discipline become the paradigmatic exemplars. During a period of 'normal science, practitioners and researchers apply the exemplars at the core of the paradigm to new fact situations in order to explain them. This is what Kuhn refers to as 'puzzle solving'. If a new fact situation or observation cannot be explained or solved by these exemplars, then the discipline must either claim that it is not a valid area of study for them or that it represents a disciplinary anomaly. Kuhn says that such anomalies are 'problems' for the discipline.

It could be that these problems are able to be addressed by new or innovative practices that are not based on the existing paradigmatic exemplars. These innovative solutions may begin to form an alternative disciplinary matrix, but one that does not yet provide any clear or formal exemplars of its own. Since there is no paradigmatic threat to the existing order, these innovations can be marginalised as being watered down versions of what is currently done within mainstream practice.

However, given enough such problems, the discipline then moves into a time of crisis' in which the paradigm is increasingly unable to explain the sorts of things in which practitioners are interested or what the rest of the world expects from the discipline. An alternative theoretical paradigm begins to form in response to the anomalies, in which some of its methods that are resilient and effective enough begin to acquire exemplar status, by force of simple acceptance by sufficiently influential practitioners. Elements of the old paradigmatic core (the existing exemplars) move into the new disciplinary matrix (which surround the new paradigmatic core) but do not retain their status as exemplars. There is no sudden shift and the shift may, in fact, look seamless from a historical perspective and to those who are schooled in the new paradigm. A 'revolution' will, therefore,

have occurred, which appears to be an inevitable, organic consequence of changing worldviews in a responsive profession or discipline.

This thesis relies on a significant underlying assumption about the positive merit of the widespread migration of therapeutic jurisprudence practices to mainstream courts, but only for the purposes of framing the research question and not for the normative purpose of arguing such merit. Neither does it address the interesting but different question of whether, if it were possible to start from scratch and design the perfect judicial system, that system would be primarily adversarial in nature and function.

Courts operating according to therapeutic jurisprudence principles (such as the so-called problem-solving, or solutions-focused courts) are generally distinguishable from the mainstream courts in terms of their focus on individual litigant improvement, their concern with outcomes and the relationship between litigants and judges (what I would refer to as ‘therapeutic foci’).<sup>71</sup> A typical adversarial court, conversely, is usually characterised by an almost exclusive focus on the integrity of process as the benchmark for success. A trial or hearing that demonstrates adherence to due process, natural justice and, to some extent, what are usually regarded as the core principles of adversarialism would usually be regarded as procedurally and substantively fair—and, therefore, successfully serving its purpose. This may act to privilege efficiency above effectiveness.

A therapeutic paradigm would ideally be compatible with, although not solely comprised of, all the principles of therapeutic jurisprudence. For that reason, principles derived from therapeutic jurisprudence are a useful benchmarking set by which to test compatibility of a therapeutic paradigm with the adversarial paradigm. There is uncertainty and some disagreement (as outlined above) about the *status* of therapeutic

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<sup>71</sup> Peggy Hora and Deborah Chase, ‘Judicial Satisfaction When Judging in a Therapeutic Key’ (2004) *Contemporary Issues in Law* 8.



jurisprudence, which seems to be most recently characterised by a retreat from affording it the quality of a theory, despite very strong evidence that it is much more than simply a way of making legal processes more user-friendly. The key question of how the therapeutic jurisprudence sees itself, as one method of testing its status as a paradigm, is considered in detail in Chapter 5.

Although there is little or no disagreement in the literature that therapeutic jurisprudence has developed an identifiable and distinct conceptual framework, it is currently more likely to be described as a lens, vector or heuristic than as a theory. The conceptual framework consists of the interdisciplinary knowledge and the ideas about law having both therapeutic and anti-therapeutic effects. As a heuristic, the literature continually refers to the iterative approach to judging, whereby the therapeutic judge will endeavour to solve problems by an iterative process of trial and error in applying the relevant social science knowledge to the scenario or litigants they are working with.

Wexler reminds us that the genesis of therapeutic jurisprudence did not lie in an attempt to construct a theoretical explanation for the court system or legal system, but more in an attempt to create tools and methods for assessing and remedying the effects of legal rules, roles and processes in the legal system.<sup>72</sup> In this regard, the movement has been extraordinarily successful, which partly explains calls from within for its mainstreaming. This gives practitioners and the judiciary a very strong sense of ownership over therapeutic jurisprudence, and perhaps a perceived sense of responsibility to monitor how it is characterised and how it develops. Wexler also conceives of therapeutic jurisprudence as a process for developing research questions and practical solutions to seemingly intractable problems in how the legal system functions, which is a role discussed in Chapter 5.

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<sup>72</sup> Marilyn McMahon and David Wexler, 'Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand' (2003) 20(2) *Law in Context* 1, 2.

Daicoff, as discussed above, situates therapeutic jurisprudence within what she refers to as the comprehensive law movement. However, others, such as Freckelton, warn against referring to it as movement at all. His position appears, to some extent at least, to be a matter of political preference rather than jurisprudential analysis, as it is motivated by concerns that labelling a field as a 'movement' has unwanted overtones of a cult or a fad.<sup>73</sup>

In Chapter 5, I argue that this reluctance and disagreement is motivated more by a fear of marginalising therapeutic jurisprudence in ways similar to a host of other jurisprudential movements of recent decades, and by a heavy preponderance of members of the judiciary and legal practitioners working in the field. In that chapter I also examine the reluctance in the therapeutic jurisprudence literature to settle on any convincing or well-thought-out explanation of therapeutic jurisprudence's ontological status.

One of the attempts to engage in meta-analysis of the status and relationships that exist between the various therapeutic and restorative innovations (although not their relationship to adversarial principles) within the legal and justice systems, as mentioned above, is Daicoff's positing of the comprehensive law movement. Daicoff identifies nine converging vectors that are said to comprise the movement. They are: collaborative law, creative problem solving, holistic justice, preventive law, problem-solving courts, procedural justice, restorative justice, therapeutic jurisprudence and transformative mediation.<sup>74</sup> In trying to describe what it is that these vectors have in common, she says that they are 'a movement towards law as a healing profession ... [that] takes an explicitly

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<sup>73</sup> Freckelton, above n 43, 598.

<sup>74</sup> Daicoff, above n 64. See also Susan Daicoff, 'Afterword: The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement' in DP Stolle, DB Wexler and BJ Winick (eds), *Practicing Therapeutic Jurisprudence Law as a Helping Profession* (2000); Susan Daicoff, 'The Comprehensive Law Movement: An Emerging Approach to Legal Problems' (2006) 49 *Scandinavian Studies in Law* 109–29.

comprehensive, integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to law and lawyering'.<sup>75</sup>

Both Daicoff and some other commentators express concerns that despite having some common elements and aspirations, we ought to respect their individual differences so as (presumably) not to dilute or marginalise their individual development and contributions. There seems to be an implicit view that the importance of separate evolution trumps too serious an attempt at conceptual and theoretical amalgamation. Thus, despite the undoubted importance of Daicoff's initial attempt at meta-analysis, little has been done to extend this work.<sup>76</sup>

Although the thesis will assert and defend the position that therapeutic jurisprudence does, in fact, meet many of the requirements we would expect of a theory in the social sciences or humanities, and in jurisprudence, it does not rely on an assertion that therapeutic jurisprudence itself is a self-contained and comprehensive juristic paradigm. This thesis does not set out to examine what barriers there might be to constructing a legal system based primarily on therapeutic jurisprudence (regardless of whether we accept or deny that it is a theory). However, the thesis does, in part (mainly in the Chapter 6 discussion of incommensurability) examine whether the adoption of a significant number of therapeutic jurisprudence principles into the mainstream court system would require a new juristic paradigm based on therapeutic principles. This purported set of therapeutic principles could subsume those that have to date been developed and pursued by the therapeutic jurisprudence movement.

This is an absolutely critical point. This thesis should not be seen as an attempt to furnish therapeutic jurisprudence with an unreasonably broad

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<sup>75</sup> Ibid 2.

<sup>76</sup> Especially when combined with the political context and sensitivity implied in Freckelton's concerns noted above.

purview, but to ultimately characterise it as part of a wider theoretical and practical trend towards the abandonment of some long-standing adversarial principles in favour of therapeutic principles, which may lead to a fundamentally transformed legal system.<sup>77</sup> The primary function of a court is traditionally (and often legislatively) mandated to be dispute resolution, so naturally those appearing in a court are constructed as disputants.<sup>78</sup> Granted, in most civil jurisdictions there is significant provision for the utilisation of alternative dispute resolution where a formal hearing or trial is not deemed appropriate or optimal. There are even some equivalent criminal procedures.<sup>79</sup> Nevertheless, when a trial is unavoidable or where the litigants choose a formal hearing, a declaration of the legal rights and positions of the parties or a statement of a resolution in terms of the relevant law is, paradigmatically, the ultimate focus of the proceedings. That is the essential outcome traditionally required of civil litigation—a statement of the parties' relative legal positions, a statement that the parties request themselves and that they are responsible for resourcing (in the sense that the parties lead the evidence they choose).

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<sup>77</sup> As will be seen in Chapter 5, however, a number of commentators who are both supportive and critical of therapeutic jurisprudence do examine and champion this wider purview.

<sup>78</sup> For example, r5(1) of the *Uniform Civil Procedure Rules 1999* (Qld) provides that the underlying philosophy on which the rules about civil litigation in Queensland are based relates to the resolution of disputes that have a *legal* solution: 'The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.'

<sup>79</sup> Various court-enabling statutes in Queensland provide for voluntary mediation in some criminal matters. 'Justice mediation' is a face-to-face meeting between a person who has been harmed in an incident and the person accused of the act or omission alleged to have caused the harm. The complainant has an opportunity to ventilate how they were affected by the defendant's actions and the defendant has an opportunity to try to repair the harm their actions have caused. A resolution may involve agreeing to do something for the complainant, such as paying money or repairing damage or making an apology, or agreeing to attend counselling or enrol in special courses. A judge may then take into consideration these outcomes when determining how to proceed with the matter. See *Justices Act 1886* (Qld) s 53, and the relevant policy available online: <<<http://www.justice.qld.gov.au/justice-services/dispute-resolution/justice-mediation>>.

This traditional conception of the purpose of litigation and court procedures presupposes the existence of a justiciable dispute and of parties who pursue their matters competently and, at least to some extent, in good faith. It largely assumes that a focus on individual litigant improvement, non-legal outcomes and relationships between judges and litigants would be either irrelevant, of minor or secondary importance or even inconsistent with procedural integrity in an adversarial forum. Limiting a court in any particular proceeding to the declaration of a legal resolution seems to either marginalise or preclude engagement (by judges) with the litigants that is overtly therapeutic.

The relatively slow up-take of therapeutic jurisprudence in the mainstream civil court could be due, as will be discussed in Chapter 5, to a perception among some judges that engaging with the root causes of disputes or offending behaviour are not (for practical or other reasons) part of their legitimate and valid role.<sup>80</sup> This is particularly so in the United States (US) jurisdictions. However, there is recent precedent in Australia for attempts to reduce the adverse effect of adversarial civil litigation on litigants outside of the problem-solving courts, especially the legislated changes to the conduct of child-related proceedings in the Family Court of Australia.<sup>81</sup>

One assumption, to be explored throughout the thesis, is that therapeutic jurisprudence foci are intrinsically worthwhile, an assumption rooted in the central therapeutic jurisprudence claim that where due process, legal rights and fairness are not compromised, court processes that promote

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<sup>80</sup> In *R v Peterson* (1984) WAR 329, 332, Burt CJ is often cited as an example of a judicial attitude that regards the wider social and personal causes of criminal behaviour involving drugs or alcohol (for example) to be 'beyond the reach of any court'.

<sup>81</sup> Pt VII div 12(a) of the *Family Law Act 1975* (Cth) was amended in 2006 to require that, in a child-related proceeding, the judge must control and direct the proceedings in such a way as to minimise the effect of the proceedings on the child. The Act requires that the judge conduct the manner as informally as possible and in ways that will promote cooperative and child-centred parenting. See Bryant and Faulks, above n 4.

individual autonomy and psychological well-being are objectively to be preferred to processes that do not. This assumption is sometimes held up as being axiomatic by key therapeutic jurisprudence proponents, who often argue that researchers should avoid too precise a definition of therapeutic, for example.<sup>82</sup>

There is a theme within this thesis, then, that by integrating certain therapeutic jurisprudence practices pioneered in the problem-solving courts into the way judges deal with some particular mainstream civil proceedings, there will be an intrinsic benefit that does not compromise due process and fairness and that provides scope for the three therapeutic jurisprudence foci of: individual litigant improvement, a greater concern with outcomes (as a benchmark of success) and the relationship between litigants and judges. This seems like a more realistic and defensible agenda than advocating for rapid and radical change, not just in reforming how the law operates to reduce its negative effects, but to radically transform the law into a healing profession.<sup>83</sup> As will be seen in Chapter 2, true paradigm shifts are rarely rapid, neither are they seen at the time as particularly radical in scope or nature. The language and method of one paradigm morphs into the next and the evolution of the discipline appears to have been smooth, natural and inevitable.

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<sup>82</sup> David Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy and Law* 220. An assertion hotly disputed by a number of authors, such as Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder, (1995) 1 *Psychology, Public Policy and Law* 193; Dennis Roderick and Susan Krumholz, 'Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence' in MF Miquelon-Weismann (ed) *Trends and Issues in Scientific Evidence* (2007) vol 1, 201.

<sup>83</sup> Susan Daicoff is notably in this vein: above n 64. This wider therapeutic jurisprudence agenda has been criticised as largely impractical given the assertion that most social problems result 'not from a lack of knowledge but from conflicting value priorities and competing societal interests': Dennis Fox, 'Social Science's Limited Role in Resolving Psychological and Social Problems' (1991) 17 *Journal of Offender Rehabilitation* 159. See also Roderick and Krumholz, above n 82, 222.

The successes of the problem-solving courts (measured by such criteria as reduced recidivism rates, judicial satisfaction, community support for the reforms and increased engagement of the offender) are due, in part, to the fact that they are not so much concerned with the adjudication of disputes as with confronting and facilitating the resolution of the problems and the recognition of the social and psychological contexts that are thought to give rise to disputes and unlawful conduct.<sup>84</sup> That is the sense in which these particular courts are usually conceived of as being therapeutic.<sup>85</sup> One therapeutic jurisprudence practitioner suggests that an important reason why the problem-solving courts ‘work’ is that: ‘They [the courts] seize upon a moment when people are open to changing dysfunctional behaviour—the crisis of coming to court—to give them the opportunity to change’.<sup>86</sup> In Australia, current attempts to implement therapeutic jurisprudence practices into mainstream courts (from within the mainstream jurisdictions themselves) seem mostly limited to particular proceedings in the Family Court (as indicated above).

Mason’s position<sup>87</sup> neatly encapsulates the antithesis to the thesis I advance here. My thesis is that we are, in fact, at a point of Kuhnian crisis where courts are increasingly seen as a backstop to be invoked where other attempts at resolution fail or where therapeutic processes are not possible. Some courts (and especially court precincts such as the Victorian neighbourhood justice centres<sup>88</sup> or the Red Hook Community Justice Centre)<sup>89</sup> are becoming general service providers and will probably continue to do so. The fear of courts becoming somehow inferior under a

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<sup>84</sup> This is not to assert that problems are resolved in an absolute sense. The drug courts do not claim to ‘cure’ offenders of drug addiction, which is usually considered to be a lifelong struggle.

<sup>85</sup> In addition to the greater sense of satisfaction and purpose that lawyers and judges may experience working in these jurisdictions.

<sup>86</sup> Michael King, ‘What Can Mainstream Courts Learn from Problem Solving Courts?’ (2007) 32(2) *Alternative Law Journal* 91.

<sup>87</sup> Mason, above n 57.

<sup>88</sup> <<http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm>>.

<sup>89</sup> <<http://www.courtinnovation.org/project/red-hook-community-justice-center>>.

changed paradigm goes a long way to identifying the source of judicial resistance to a therapeutic paradigm and another illustration of a need for this thesis. The fear that a paradigm shift involves the jettisoning of everything of importance associated with the displaced paradigm is misplaced because it is incorrect. A Kuhnian paradigm shift rarely involves wholesale change. It would be counterintuitive to conceive of as inferior a court system that continues to perform its current job, but is also able to perform that job in a less damaging way and then resolve problems that have been seen as intractable.

Thus, if a shift to a therapeutic paradigm would not spell the end for our current court and legal systems, we need to consider what then would be at stake in deciding if therapeutic jurisprudence really is part of an alternative to the adversarial paradigm and not just set of pragmatically incremental changes within the adversarial paradigm. Again, the answer to this question, if we accept the Kuhnian analysis undertaken in this thesis, is to be found in the incommensurability concept. If adversarialism and therapeutic jurisprudence really are separate and competing theoretical paradigms, then the roles of the adversarial judge and the therapeutic judge are what Kuhn described as incommensurable. This means that not only would an adversarial judge and a therapeutic judge often disagree about what the bottom line is, they would have no common language to use to debate the issue and not even any common exemplars that they could both agree on as being examples of best practice.

If they are not competing paradigms—in that they can somehow co-exist<sup>90</sup>—then our basic task as researchers and practitioners is to work out which elements of each are compatible and whether all that is required to mainstream therapeutic jurisprudence is simply some non-paradigmatic fine-tuning of the adversarial system or the creation of some form of hybrid paradigm. Thus, another outcome from this thesis would be to recommend

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<sup>90</sup> In chapters 2 and 6, ‘co-existence’ of the two will be conceived of as meaning that there is no Kuhnian ‘incommensurability’ between the two.



to non-adversarial practitioners that this is their role, rather than to achieve anything more fundamental.

One of the very real risks of the casual use of terms such as ‘paradigm’ and ‘paradigm shift’ is that it can be too easy to read too much into a question. Such use can quickly turn members of a discipline away from fundamental debate by giving the impression that advocates for change are being too ambitious, too general or advocating some sort of popular revolution. This thesis, however, adopts a formal Kuhnian (and neo-Kuhnian) conception of those phenomena, following on from a long tradition of applying the concept of a paradigm shift to the social sciences and to the humanities.

Such rigorous application of the formal concepts, rather than their colloquial counterparts, will often ameliorate some of the fears and reservations about allowing an innovation paradigm status. This process is undertaken in depth in chapters 4, 5 and 6. The reason why a reasonable jurist who is concerned about the preservation of due process rights, and other hallmarks of adversarialism, should not be afraid of a paradigm shift in our current juristic model is that a shift does not entail a total replacement of principles, rules or values. A Kuhnian paradigm shift to a therapeutic juristic model would not entail the loss of adversarial principles or processes altogether. In fact, Kuhn is at pains to emphasise that a new paradigm has to retain virtually all of the replaced paradigm’s ability to solve quantitative or doctrinal problems within the discipline. What the old paradigm loses, in effect, is some of its qualitative and explanatory power. Of course, therapeutic jurisprudence is seen by many of its advocates as a lens that provides a different qualitative perspective on what the law, legal institutions and legal actors ought to be doing in many instances. A Kuhnian paradigm shift is about the evolution of disciplines, not about progress by the total rejection of the cumulative disciplinary matrix that has developed over time.

Although the outcomes and achievements of practitioners within a discipline might be permanent, the theoretical positions that purport to describe and explain those outcomes are not. What matters to litigants in a civil dispute is that the dispute is settled, not the theory or juristic values that describe how the process worked. It is only the number of explicable practices and methods that grow and evolve; there is no similar growth in the number of paradigmatic theoretical explanations for practices within the discipline. If there is a shift to a therapeutic paradigm, adversarial courts would almost certainly still be recognised as having achieved their (then) objectives to a large degree, but there is no guarantee that similar outcomes would be viewed as successful if they eventuated under the newer paradigm.

## **1.8 Significance and Original Contribution to Knowledge**

The key significance of this research is that it addresses and tests what may be the most difficult obstacle to the implementation of therapeutic judging in mainstream civil courts. That obstacle is the perception (and perhaps the reality) that the interventionist style of the therapeutic judge is incompatible with the formal and legal requirements of an adversarial court. Unless this perceived incompatibility can be thoroughly articulated and tested, before Australian superior court judges attempt to implement elements of therapeutic jurisprudence in their courts, any encouragement for them to do so may be premature and even irresponsible.

A superior court judge who attempts to implement therapeutic jurisprudence practices will likely be relying on different juristic principles than those that traditionally inform the adversarial court. Warren summarises some of these principles in this way:

1. An emphasis on problem-solving dispute avoidance rather than on simple dispute resolution on the basis of a legal ruling
2. An emphasis on collaboration rather than adversarialism

3. The judge as a coach who looks forward, rather than as an arbiter who looks only backward for precedent
4. A commitment to being informal and effective, rather than formal and efficient
5. An emphasis on the needs and interests of the litigants rather than a sole emphasis on their legal rights
6. An interpretation and application of social science findings and principles rather than a total reliance on the interpretation and application of law.<sup>91</sup>

Clearly, these principles could be seen as paradigmatically different to those that would normally define the operation of a superior civil court and are unlikely to be embraced by judges solely on the grounds that they are proving to be effective in some specialised criminal courts, or in the specialised jurisdiction of the Family Court. King observes that:

therapeutic jurisprudence has not become a dominant paradigm in legal practice and in the justice system in Australia ... yet its impact on the justice system has been rapid over the past five or six years ... we may well be in the process of a paradigm shift in the way in which courts, lawyers and other justice system professionals approach their work towards a more humane and psychologically optimal way of handling legal matters.<sup>92</sup>

A paradigm as intimately connected to social and political norms as the adversarial legal system is not likely to change as the result of the emergence and success of a single or even limited number of alternative theories or practices. As Kuhn suggests, most professionals are narrowly trained specialists who work entirely within their paradigms until the number of problems, anomalies and failings of the paradigm reach a critical mass and the paradigm is recognised as being in crisis.<sup>93</sup> Once the

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<sup>91</sup> Bruce Winick and David Wexler, *Judging in a Therapeutic Key* (2003) 182, from a table provided in that text by Judge Roger Warren, President of the National Centre for State Courts.

<sup>92</sup> Michael King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129, 141.

<sup>93</sup> SSR. Although most of Kuhn's writing in that work relates to the nature of scientific paradigms, its greatest influence has been in the humanities and social sciences.

crisis is widely acknowledged, only then does the relevant group of professionals have a serious normative discourse about comprehensive future directions (rather than about ad hoc or jurisdiction specific developments). This may lead to a relatively rapid revolution in the adoption of a new paradigm in which previous academic explanations are integrated with the new paradigm to make it appear as if the new way of doing things is a logical and rational evolution of all prior research and practices.

I take the work of King, Freiberg and others as suggesting that there is at least a need for a shift in the juristic paradigm to a non-adversarialism focus in response to a growing number of anomalies. The significance of this thesis is that it will contribute, in part, to the body of work that seeks to determine whether there really is scope (as these researchers seem to suggest) for a broad-based shift in focus from a dispute resolution paradigm to a problem-solving paradigm in the Australian legal system. Freiberg has asked the question of whether therapeutic jurisprudence in Australia represents a paradigm shift or whether it is more a case of pragmatic incrementalism,<sup>94</sup> but that question has not been significantly explored until dealt with in this thesis. The central implication is that if therapeutic jurisprudence reforms are limited to incremental and uncoordinated changes, without a sound theoretical base, then the relevant reforms may well become dependent upon individual judges, lawyers and legal academics and a watershed opportunity for reshaping the justice system may be lost.

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Interestingly, if we were to accept Kuhn's view of the way paradigms change some of the theoretical and empirical criticisms of therapeutic jurisprudence (such as the claim that the concept of 'therapeutic' is indeterminate) it may ultimately be of only academic interest—as whether or not the new paradigm is accepted depends more on its ability to reflect shared contemporary values, emotional and psychological satisfaction and its ability to generate new predictions, rather than on theoretical rigour alone.

<sup>94</sup> Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2003) 20(2) *Law in Context* 6.

## 1.9 Conclusion

In order to achieve the conceptual and analytical agenda foreshadowed above, the rest of the thesis will adopt the following structure. Chapter 2 explains the nature of Kuhnian paradigms, with particular attention to their theoretical and conceptual relevance to changes in the legal system. In Chapter 3, I assert and defend the claim that juristic models are appropriate phenomena to conceive of as being susceptible to paradigm shifts. Once this is established, I argue in Chapter 4 that the current juristic model (both in Australia and in similar common law jurisdictions) is clearly defined by an adversarial paradigm.

To enable a Kuhnian comparison of therapeutic jurisprudence with adversarialism, I then embark in Chapter 5 on an analysis of the ontological status of therapeutic jurisprudence, asking whether it can be conceived of as either itself paradigmatic of some juristic model, or as part of a wider therapeutic paradigm. In the penultimate chapter, Chapter 6, I ask, if we so grant that therapeutic jurisprudence can be conceived of as a paradigm or as an integral part of some therapeutic paradigm, whether it is then incommensurable with the adversarial paradigm and what the implications of such incommensurability might be.

In the conclusion to the thesis, Chapter 7, I draw the analytical and conceptual threads of the thesis together by confirming that there are, indeed, issues of incommensurability between adversarialism and therapeutic jurisprudence, but that these issues, to some extent, drive the integration and mainstreaming process rather than prevent it. When confronted by Kuhnian problems, rather than by mere puzzles, the adversarial paradigm has adopted some non-adversarial exemplars. The adversarial disciplinary matrix exists, therefore, within a normatively malleable environment and does not exclude the adoption of therapeutic principles and practices at more than a superficial level.

## **Chapter 2**

### **The Nature of Kuhnian Paradigms—The Theoretical and Conceptual Relevance for Law**

#### **Contents**

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#### **2.1 Introduction**

This chapter investigates and explains the paradigm construct and the process of paradigm shifts. It provides the groundwork for applying these concepts to law as a discipline that sits within the social sciences and humanities. In order to establish whether a Kuhnian analysis of legal systems is valid, we need to first clearly articulate what Kuhn's conception of the paradigm shift is, and to then consider whether this process can be validly applied to disciplines outside of the natural sciences. The more specific question of whether a legal system can be conceived of as operating pursuant to a Kuhnian paradigm is explored in Chapter 3.

In order to explain the concept of the paradigm shift, the chapter draws on Kuhn's original source material and later publications as they evolved in

response both to Kuhn's critics and his own later reflections.<sup>1</sup> One consequence of the widespread, shallow application of the paradigm shift concept (touched on in Chapter 1 and in section 2.4) is that it is very often applied by academics and researchers with a lack of attention to the primary Kuhn material and as such is a superficial application of the methodology. This chapter seeks to avoid that pitfall.<sup>2</sup>

The concept of a paradigm<sup>3</sup> is used very often in academic writing, across a wide range of disciplines<sup>4</sup> and with a number of meanings.<sup>5</sup> In most

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<sup>1</sup> Kuhn began his career as a scientist and his academic work initially focused on his PhD physics project. When he was awarded a three-year research fellowship at Harvard, however, he switched his attention to the history and philosophy of science, which he then taught at Harvard until moving to UC Berkley, where he was Professor of the History of Science, and it was there that he wrote his most influential work—SSR.

<sup>2</sup> The major source for this chapter is the 3<sup>rd</sup> edition of SSR, published in 1996. SSR was originally a long article in the *International Encyclopedia of Unified Science*. This was a publication of the Vienna Circle of philosophers aimed at constructing a single theory to explain change and development within sciences and academic disciplines (a fundamental belief of the logical positivist school being that such a theory was possible). SSR was first published as a monograph by the University of Chicago Press in 1962. In the 1969 2<sup>nd</sup> edition, Kuhn added a vital postscript that addressed many of the objections that arose as to the apparent vagueness of the paradigm concept and the perception that he was claiming science to be a predominantly subjective enterprise. He deals in more detail in the 3<sup>rd</sup> edition with incommensurability, which has significant influence on the analysis in this thesis, countering the claim that if rival paradigms are incommensurable then they are purely relative, since a choice between the two could not be made since one paradigm cannot be explicated in the terms of the other.

<sup>3</sup> The etymology of the word comes from the Greek *paradeiknūnai* meaning to compare, composite from *para* and the verb *deiknūnai*, 'to show'. Prior to the 1960s, it was mainly a literary term referring to an illustrative parable or fable. It was also used in the discipline of linguistics to refer to a class of vocal elements with similarities.

<sup>4</sup> Note that for the purposes of this thesis, the terms 'science' and 'discipline' are used interchangeably, as are terms 'scientist' and 'practitioner', which is consistent with the attempt to apply Kuhnian concepts to disciplines other than the natural sciences.

<sup>5</sup> Including at least education, law, sociology, linguistics, political science, economics, marketing and psychology. A broad quantitative analysis of how widely Kuhn is cited across disciplines can be found in Kathleen Loving and William Cobern, 'Invoking

instances, what is alluded to by use of the term 'paradigm' is not simply a colloquial concept of convenience, but the defining core that informs the theoretical framework of a discipline in the sense postulated by Kuhn, so the various authors assert (either expressly or implicitly). One significant reason for the popularity of Kuhn's work is that it seems to give some support and vocabulary to academics and researchers who are rebelling against tradition (what Loving and Cobern refer to as 'the thrill of revisionism'),<sup>6</sup> and rebels tend to cluster together. They often refer to their collective work as movements or communities. For that reason, adherents to innovative or alternative challenges to orthodoxy often tend to talk about the need for a *paradigm shift* (away from the existing paradigm and towards the paradigm for which they advocate). However, as discussed in Chapter 1, it is very rare for any significant effort to be made to properly align the use of the paradigm and paradigm shift concepts to the Kuhnian method. The risk of this omission is that this thrill of revisionism can displace academic rigour.

There is also a risk that the evangelical fervour associated with the rise of a new academic movement can lead to intellectual hubris at the expense of objectivity.<sup>7</sup> Given that many versions of, or references to, the paradigm phenomenon in academic writing lack analytical or conceptual depth, they are often vague to the point of being colloquial. Vagueness is antithetical to the concept of a paradigm, and for that reason, the following sections of this chapter attempt to be analytical and precise in the mapping of both adversarialism and therapeutic jurisprudence with the paradigm concept.

It is also true that one criticism of the Kuhnian concept of the paradigm is that it is, itself, conceptually vague and that it is not realistic to conceive of

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Thomas Kuhn: What Citation Analysis Reveals about Science Education' (2000) 9(2) *Science and Education* 187.

<sup>6</sup> Loving and Cobern, above n 5, 191.

<sup>7</sup> Most therapeutic jurisprudence advocates are well aware of the risk of hubris: Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risk of Influence' (2008) 30 *Thomas Jefferson Law Review* 575, 576.



an entire discipline as operating with reference to a single paradigm. This is largely a misinterpretation of Kuhn, however. A paradigm can allow for a range of methodologies and theoretical positions. Its greatest value, though, is that it provides a mutually agreed point of reference for the comparison of all theoretical positions within a discipline. Regardless of how the concept is defined, the role and function of a paradigm is fundamental and precisely delineated.

Paradigms, for Kuhn, explain the reality that practitioners within a discipline always seem to have a capacity to come to a collective agreement on the facts. This is not to suggest that what Kuhn proposes is simply a sociological description or explanation of changes within disciplines based on why practitioners within a discipline believe what they believe. A sociologist might attempt to explain, for example, why a particular paradigm is accepted in terms of the beliefs of its practitioners about what constitutes validity, or about their attitudes, but not in terms of validity itself. Kuhn's conception of the paradigm and of paradigm shift certainly does contain important sociological elements, but he also attempts to prescribe what validity in a discipline actually is, by comparing the *content* of different (historical) paradigms within a discipline, rather than simply the beliefs and attitudes of the discipline's practitioners in isolation from that content.<sup>8</sup> Paradigms, according to Kuhn, shift as a result of the beliefs and attitudes of practitioners, but paradigms must have a validity that is referable to something more than those beliefs and attitudes.<sup>9</sup>

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<sup>8</sup> This is in contrast to the more analytical and positivist stance of other philosophers of science, most notably Karl Popper, who argued that a science or discipline undergoes fundamental change only as a result of key theories or hypotheses being falsified by later data.

<sup>9</sup> At SSR 11, for example, Kuhn traces the evolution of paradigms in optics. Physicists now work on the core postulate that light is composed of photons. However, less than 50 years earlier, light was characterised as a transverse wave motion, and fifty years before that as 'material corpuscles'. The beliefs and attitudes of physicists working within each paradigm was essential to the content of the paradigm, but they were not arbitrary beliefs

## 2.2 The Nature of Paradigms

Kuhn acknowledges in the 1969 postscript to SSR that his work alludes to two major conceptions of paradigm, one broad and the other narrow. The broader of the two conceptions of the paradigm was one that, he says, 'stands for the entire constellation of beliefs, values, techniques and so on shared by the members of a given community'.<sup>10</sup> That conception seems amply broad enough to draw various conceptions of the law within its ambit.

The narrower and more analytical conception of the paradigm, similarly articulated in the postscript, holds that a paradigm is 'one sort of element in that constellation, the concrete puzzle solutions which, employed as models or examples, can replace explicit rules as the basis for the solution of the remaining puzzles of normal science'.<sup>11</sup> The following sections seek to explain the content of both of those definitions in ways that lend assistance to a conceptual comparison of adversarialism and therapeutic jurisprudence.<sup>12</sup> It is the narrower of these two conceptions, however, that provides the sharpest focus for the incommensurability phenomenon, which, as I argue in Chapter 6, is the best analytical tool for delineating the relationship between therapeutic jurisprudence and adversarialism.

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and attitudes, they were referable to observation and the results of hypothesis testing. The question Kuhn focuses on is: 'In what sense is the shared paradigm a fundamental unit for the student of a discipline, a unit that cannot be fully reduced to logically atomic components which might function in its stead?'

<sup>10</sup> SSR 175.

<sup>11</sup> Ibid.

<sup>12</sup> Paradigms are first described by Kuhn (in the 1<sup>st</sup> edition of SSR) as 'models from which spring particular coherent traditions of scientific research'. An emphasis on cultural factors is made more explicit when he later suggests a paradigm is 'what the members of a scientific community share' or 'a scientific community consists of men who share a paradigm'.

## 2.2.1 Historical and Conceptual Background—Bachelard and Kelsen

### 2.2.1.1 Bachelard

Conceptual precursors to the anti-positivist theme in Kuhn's view of disciplinary evolution can be found in the work of Gaston Bachelard.<sup>13</sup> A basic outline of the conceptual forerunners to Kuhn is essential to understanding both how the concept of the paradigm shift revolutionised how we conceive of disciplinary change, and how it was a natural outcome of existing changes in worldview. This is especially in the sense that the intense faith in the objectivity and rationalism of science spurred by the Enlightenment (epitomised by the dominance of the logical positivists in the early 20<sup>th</sup> Century) began to come under attack from those who recognised and experienced the effect that subjective views, personalities and group dynamics had on what an academic discipline held as its core doctrine.<sup>14</sup>

Bachelard is of interest due to his attempts to assert and explain the idea that there are discontinuities in the history and development of a field/discipline. These discontinuities are sometimes 'breaks' in the way science formulates its concepts compared to the common-sense or lay conception. Breaks for Bachelard may also be those that occur between

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<sup>13</sup> Primarily in Gaston Bachelard, *The Psychoanalysis of Fire* (1938).

<sup>14</sup> Logical positivism is an approach to knowledge founded on empiricism and rationality. It holds that all knowledge, regardless of what field it comes from, can be reduced to a single scientific language. All knowledge is based on observation and the subjective properties of the observer are irrelevant to its truth. Thus, what establishes the core doctrine of a discipline is public experimentation and verification of empirically produced data, not the experiences or personal beliefs of any one practitioner or group of practitioners within the field. This single scientific language is supposed to be then reducible to the script of formal logic. According to positivists, knowledge must be true for all times and all places, it is never relative to any particular time, place or persons. This is very different to the Kuhnian version of disciplinary change, which holds that what counts as 'knowledge' changes as the beliefs and values of practitioners within a given field reach a critical mass of dissent (even in the absence of a single, critical counterexample to what is currently believed).

different scientific or academic conceptions of a phenomenon—such as between different historical conceptions in science as to what an atom is. Bachelard claimed that these breaks, *qua* scientific progress, are not usually determined by collating, in some jigsaw pattern, the established truths of science. For him the epistemological acts that produced these breaks were guided not by science but by something akin to poetry—by art and imagination. For Bachelard, scientific progress depends on the epistemological ruptures inspired by creativity rather than by strict application of the scientific method and incrementalised hypothesis testing. Science for him cannot, therefore, be seen as progressing linearly or necessarily rationally, and this is why he ought to be seen as a theoretical precursor to Kuhn.

Bachelard was self-educated in the fields of chemistry and philosophy so that, although he eventually wrote a PhD dissertation that enabled him to lecture at the Sorbonne, he developed as an academic largely outside the academy. This, together with his fascination, shared by many of his contemporaries, with the fundamental worldview changes inherent in advancements in particle physics in the early 20<sup>th</sup> century, explains the anti-positivist stance he took in relation to the philosophy of science and his contributions to the development of post-structuralism.

Bachelard asserted a number of positions in relation to an anti-positivist explanation of the development of scientific disciplines and knowledge that foreshadowed the work and conclusions of Kuhn, although his contributions to, and influence on, Kuhn's work are rarely acknowledged or explored. According to Marshall:

[Bachelard's] work involved a constant polemic against philosophers because, according to him, philosophy wanted to cover up, hide and occlude 'the real historical conditions of the production of scientific knowledges'. Indeed, the idea that the history of science could be a fruitful source, even a source, for logical analyses was quite alien to analytic philosophy of science.

Also he believed that physical theories were not divorced from metaphysical commitments, though they might claim to be so.<sup>15</sup>

Bachelard was concerned with the process of scientific change and scientific progress as illustrations of his view that epistemology was more than an analytical phenomenon. He held that the development of knowledge within a particular scientific discipline was best understood not by studying that discipline now, but by studying its history—especially the history of the changing psychology of people within a given field. Bachelard described and illustrated how the apparent linear progress of science can be blocked by ingrained psychological patterns among key members of a discipline. Such a pattern literally affected how these practitioners conceived of knowledge itself, hence the concept of the *obstacle épistémologique* or ‘epistemological obstacle’.<sup>16</sup>

We can best find the reasoning processes within a discipline, according to Bachelard, by looking at how those involved in its practical application are reasoning (presumably in journals and other scholarly publications), rather than by accepting what the abstract theories within a discipline claim. He further suggested that when abstract theory was overturned, it happened as the result of the practical work of scientists within that discipline. By analogy, we might argue that major changes in jurisprudence are initially stimulated by the work and experience of lawyers and judges rather than the work of later theorists.

Bachelard found discontinuities in the history and development of science that were not, in principle, capable of logical reconstruction. He referred to these discontinuities as epistemological ruptures, meaning breaks in the way people within the discipline actually thought. His method was to talk about discontinuity leading to ruptures and changes in concepts. However,

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<sup>15</sup> Mary Tiles, *Gaston Bachelard: Science and Objectivity* (1984) 3.

<sup>16</sup> Gaston Bachelard, *The Formation of the Scientific Mind* (2002) [trans of *La formation de l'esprit scientifique* (first published 1938)]; Gaston Bachelard, *The New Scientific Spirit* (1934) [trans of *Le nouvel esprit scientifique*].

the foreshadowing of Kuhn's reference to the comparable ideas of normal science, revolution and paradigm shift are there and there is a body of literature that examines the links.<sup>17</sup>

A rupture, according to Bachelard, is characterised by four epistemological characteristics that he refers to as breaks, obstacles, profiles and acts.<sup>18</sup> Breaks are concerned with: (i) how science breaks away from common-sense in formulating its concepts and with (ii) breaks between scientific concepts. Korner suggests that an example of (i) would be the shift from common-sense notions of intelligence as concerned with a person's ability to solve problems in the real world to intelligence abstracted as a score on an intelligence test (the so-called IQ).<sup>19</sup> The latter is a quantified phenomenon that is, therefore, amenable to experimentation within disciplines such as psychology and education. An example of sense (ii) would be the changes that have occurred historically in the scientific concepts of the atom (from, say, the 460 BC work of Democritus suggesting that atoms were the smallest indivisible bits of matter, through to Max Planck's theory of quanta to Heisenberg's uncertainty principle).

Breaks are resisted by obstacles, which can be construed as residues from earlier concepts (or as Kuhn would later suggest, paradigms) that tend to block changes to new concepts. Here common-sense may be a major obstacle, operating as it does as an implicit assumption of the way the world is. This is reflected in Kuhnian theory, as discussed later in this chapter, with reference to the relationship between paradigms and worldviews or *Weltanschauung*.

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<sup>17</sup> An excellent review and analysis of this literature has been undertaken by Teresa Castaleo-Lawless, 'Kuhn's Missed Opportunity and the Multifaceted Lives of Bachelard: Mythical, Institutional, Historical, Philosophical, Literary, Scientific' (2004) 35 *Studies in History and Philosophy of Science*.

<sup>18</sup> Gary Gutting, *Michel Foucault's Archaeology of Scientific Reason* (1989).

<sup>19</sup> Stephan Korner, *Experience and Theory: An Essay in the Philosophy of Science* (1966).

Bachelard proposed a set of techniques to make these implicit assumptions explicit. He suggested, for example, that we could compile an 'epistemological profile' of any given member of a discipline; that is, an analysis of that person's understanding of a particular scientific concept. This analysis would, in turn, illustrate where the individual stood in relation to the historical development of a concept (paradigm)—and the extent to which residues were retained or breaks maximised.

Residues are challenged by breaks that are demonstrated by an act on the part of the scientist concerned. An act is a definitive movement in the direction of the break or of progress (as determined historically). Thus, Bachelard's work was counter to the orthodox (positivist) view that progress within a scientific discipline or field was determined by 'collating in a jigsaw type pattern the established truths of science'.<sup>20</sup> Kuhn diverges, however, in terms of the emphasis Bachelard places on the role played by imagination and reverie (or self-reflection) in motivating and informing breaks. Bachelard's view was that the epistemological acts that produced breaks were guided not by the failures of what Kuhn would come to call periods of normal science to deal with anomalies in practice, but by creative reflections similar to those found in poetry and art. For Bachelard, scientific progress depended upon epistemological breaks stimulated by particular acts of imagination and reflection. Nevertheless, Bachelard claimed that these breaks were distinctive and easily discernible. That is the sense in which he saw science as not progressing linearly or necessarily rationally. However, for Kuhn (as discussed below,) there comes a tipping point, only identifiable post priori, where the bulk of practitioners within a discipline seem to naturally align themselves with a new paradigm. Progress is a wider cultural effect for him, but it also has a normative effect.

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<sup>20</sup> James Marshall, 'Bachelard and Philosophy of Education' in *Encyclopedia of the Philosophy of Education* (1999).

### 2.2.1.2 Kelsen

A paradigm is, in one sense, a similar sort of phenomenon to the Grundnorm proposed by Hans Kelsen as the fundamental norm or meta-rule at the heart of a legal system. Grundnorms for Kuhn are the disciplinary exemplars within the core of the paradigm. Kelsen's Pure Theory of law conceives of a legal system as a hierarchical structure of rules and norms, and the hypothetical Grundnorm is said to have a necessary existence because of the need to find a point of origin for these rules and norms. It is the existence of this point of origin that ultimately validates the whole system of laws. This is analogous to the way in which legal positivists assert that what validates a particular law is the validity of its source (such as a properly constituted legislature or court). Kelsen posits a first authoritative source of law whose validity does not depend on the validity of any previous enacting body.<sup>21</sup>

It is difficult or even impossible to precisely define the nature or conceptual parameters of Grundnorm that does not detract from the importance of or invalidate the role it plays in the Pure Theory of Law. If we analyse any formal legal system in terms of the Pure Theory, we start from the assumption that that system stems from a particular Grundnorm. Similarly, if we were to analyse actual or potential changes (at the most fundamental level) *within* any formal legal system from a Kuhnian perspective, we start from the assumption that the legal system operates by reference to a particular paradigm.

The Grundnorm, though, is necessarily a hypothetical and fictional phenomenon. This is because, as Kelsen eventually conceded, a

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<sup>21</sup> According to Kelsen:

The basic norm is not created in a legal procedure by a law-creating organ. It is not—as a positive legal norm is—valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this pre-supposition, no human act could be interpreted as a legal, especially as a norm-creating, act.

Hans Kelsen, *General Theory of Law and State* (1946).



Grundnorm cannot be both fundamental (or actual) and have a normative effect. If that were the case, then we would be stuck with asserting that a Grundnorm was normative because it was fundamental (or original), and fundamental because it was normative. However, a particular paradigm that lies at the heart of a discipline, even if it cannot be precisely or exhaustively described, does (and must) have actual existence.<sup>22</sup> It is not a hypothetical construct.<sup>23</sup> Therefore, as discussed in greater depth in Chapter 3, if we are to analyse changes in legal systems in terms of paradigm shift, then it is important to acknowledge that we are referring to something more than changes in hypothetical constructs. A paradigm is fundamentally normative in the sense that it sets the standard against which all other assertions and practices within the particular discipline can (and ought to be) measured or validated. It derives its status as a paradigm by a mixture of practical success and the political and social acceptance of practitioners within the discipline.

### **2.2.2 Kuhn on the Nature of the Paradigm**

Kuhn uses the term ‘paradigm’ in a number of different senses over time, as his views crystallise and evolve. At least 20 varying articulations of the concept can be found in his work, although the core meaning and the role played by the paradigm in disciplinary evolution seem to remain consistent

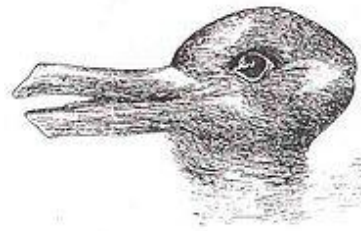
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<sup>22</sup> In section 2.4 I discuss Kuhn’s belief that the cultural dimension to the paradigm phenomenon entails that practitioners who subscribe to a particular paradigm may even disagree about some of its core rules.

<sup>23</sup> I do not seek, in this thesis, to defend Kuhnian theory, but rather to tease out and lay bare the implications of a Kuhnian analysis of the relationship between adversarialism and therapeutic jurisprudence. The classic attempt to critique Kuhnian theory on the grounds that either the vagueness or multiplicity of definitions of the ‘paradigm’ are done at the cost of coherence is Margaret Masterman, ‘The Nature of a Paradigm’ in Imre Lakatos and Michael Musgrave (eds), *Criticism and Growth of Knowledge* (1970) 59–79.

enough—these different articulations are neither ‘incoherent nor arbitrary, and to some degree even necessary’.<sup>24</sup>

Kuhn initially used the ambiguous illusion of the duck and rabbit (see Figure 2.1) to illustrate the nature of different paradigms in relation to the same discipline. In this illusion, there is a perceptual ‘switch’ between the alternative interpretations of what the observer is seeing, giving different interpretations of the incoming sense data. He later realised the limitations of this analogy because the nature of a paradigm is that it is not eradicated once it is replaced, but its findings and theories are redefined in the language of the new paradigm.



**Figure 2.1: Kuhn’s illusion of the duck and rabbit**

Sharrock and Read point out that the natural sciences are generally held up by their practitioners to be precise areas of human investigation, characterised by clearly delineated methods and concepts. In this context it is unsurprising that discourse within the philosophy and history of science that occurs at a different level of abstraction and lacks this sort of precision (perhaps necessarily) often seems frustrating and ambiguous to those engaged in applied research or practice. Discussions about the overall nature of science and of other disciplines are necessarily carried out at a gross (abstract) level consisting of ‘wide-ranging and largely unavoidably unsubstantiated generalizations’.<sup>25</sup> These authors offer the

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<sup>24</sup> Many of these different articulations are collected and reconciled by Arkady Poltnitsky, ‘Thomas Kuhn’ in H Bertens and J Natoli (eds), *Postmodernism: The Key Figures* (2002) 201–10; Masterman, above n 23.

<sup>25</sup> Wes Sharrock and Rupert Read, *Kuhn: Philosopher of Scientific Revolution* (2002) 34.

following view of both the general nature of the paradigm concept and its sociological dimension:

We do not think that Kuhn's use of the notion of 'paradigm' is really meant to set out on the meticulous classification of the different kinds of and degrees of agreement that there might be within science, across and within disciplines. It is not a sociological term of art. The notion of paradigms is, in the first instance, meant to highlight a very stark contrast, between early stages in the development and later ones.<sup>26</sup>

Paradigms are first described by Kuhn as 'models from which spring particular coherent traditions of scientific research'. An emphasis on cultural factors is made more explicit when Kuhn later suggests a paradigm is 'what the members of a scientific community share' or 'a scientific community consists of men who share a paradigm'. The definition narrows to 'a constellation of group commitments' and the community to 'those who share a disciplinary matrix'<sup>27</sup> or a 'shared example' from which a member of that community derives their understanding of the field. This notion of the paradigm as an exemplar (or of a group of shared/agreed examples) is probably that which makes its way most often into broader academic discourse—we hear and read very often of practitioners pointing to something as a 'paradigm example'.<sup>28</sup> A phenomenon within a field that is held to be paradigmatic is meant to be a classic example against which all other contenders for inclusion in that set

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<sup>26</sup> Ibid 34.

<sup>27</sup> The concept of the disciplinary matrix and of shared exemplars will be quite important and useful in later chapters as the thesis narrows down on the nature of the differences between therapeutic jurisprudence and adversarialism.

<sup>28</sup> Ostensive definitions of 'paradigm' are very common. Kuhn and other authors frequently point to obvious and widely known disciplinary changes that characterise the phenomenon—such as the shift from Newtonian physicist to quantum physics or from behavioural to cognitive psychology or from monetarist to Keynesian economic theory. As will be discussed later in this chapter, these changes within disciplinary paradigms are often (perhaps always) associated with changes in worldview. Kuhn's most commonly used examples were Aristotle's analysis of motion, Ptolemy's computations of planetary position, Lavoisier's application of the balance and Maxwell's mathematisation of the electromagnetic field: SSR 23.

of phenomena can be assessed (rather than by, for example, assessing inclusion on the basis of a list of criteria). Thus, in the sense that we can point to exemplars that define the paradigm of a discipline, the paradigm for Kuhn does have a strongly analytical dimension:

Close historical investigation of a given specialty at a given time discloses a set of recurrent and quasi-standard illustrations of various theories in their conceptual, observational and instrumental applications. These are the community's paradigms, revealed in its textbooks, lectures and laboratory exercises. By studying them and by practicing with them, the members of the corresponding community learn their trade.<sup>29</sup>

For Kuhn, this analytical element of the paradigm is composed largely of rules and doctrine, both of which would be readily identifiable and familiar to students and practitioners in the discipline of law (the legal community). However, there is also, Kuhn argues, a strong and necessary cultural element to a paradigm. We should not conclude that just because a paradigm is hypothesised to have set of definitive and shared exemplars or rules at its core, that this guarantees paradigm status.

Kuhn argues that practitioners will often work with the agreed analytical framework of their field or discipline without a full understanding of how that framework came to be paradigmatic. Some may even disagree about a precise formulation of the rules, although they agree on how they apply. Kuhn says that:

They can agree that [the rules of a paradigm] have produced an apparently permanent solution to a group of outstanding problems and still disagree, sometimes without being aware of it, about the particular abstract characteristics that make those solutions permanent. They can, that is, agree in their identification of a paradigm without agreeing on, or even attempting to produce, a full interpretation or rationalization of it.<sup>30</sup>

In this sense, claims Kuhn, the existence of a paradigm assumes a set of defining rules or exemplars, but the justification for those exemplars, or an

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<sup>29</sup> Ibid 43.

<sup>30</sup> Ibid 44.

understanding of their historical development, is not required.<sup>31</sup> In fact, the historical development of a field will usually appear smooth, as if there have been no really fundamental changes at all, but simply a few incremental and pragmatic developments to cater for new data. He observes that the fact that scientists do not routinely seem to ask or debate what makes a particular problem or solution legitimate (particularly during a time of normal science) gives the impression that they know the answer to that critical question (regardless of whether they do or not). As will be discussed in Chapter 4, it is probably the case that many (or most) lawyers have little knowledge of how the rules of adversarialism evolved in either a historical or analytic sense.<sup>32</sup> They argue about exactly what the legal rules are in a given matter, or how they ought to be applied, but they largely agree that whatever the outcome, the rules must conform with the adversarial exemplars of due process, compliance with existing legislation and common law, and the primacy of individual legal rights.<sup>33</sup>

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<sup>31</sup> Although there is strong focus on theory in SSR, there is a consistent thread of emphasis on the day-to-day practice within a discipline in Kuhn's analysis of disciplinary change. Kuhn often uses the phrase 'scientific practitioner' and he consistently articulates the processes of both normal science and revolution on terms of practice, of what individuals are doing. Thus, although 'paradigm' is often used by others to refer to large theoretical constructs or to a whole research agenda, Kuhn sees this wider framework as determined by, and not determinative of, practice. That is a good fit for the obvious dichotomy in law between those doing jurisprudence, those practicing law and those making it. See Joseph Rouse, 'Kuhn's Philosophy of Scientific Practice' in Thomas Nickles (ed), *Thomas Kuhn* (2010).

<sup>32</sup> There is no doubt that Kuhn intended the paradigm concept to apply to academic disciplines, specifically the natural sciences. However, it is, as we shall see, equally applicable to pure/theoretical strands of a discipline. Lawyers and judges are, by necessity, students of both the substantive law and of legal theory.

<sup>33</sup> Whereas, in Chapter 5, a posited therapeutic paradigm might require compliance with therapeutic exemplars, such as the healthiest outcome for a particular person, in addition to the traditional forms of due process. In other words, therapeutic and adversarial exemplars would each be necessary but neither would always be sufficient to ensure compliance with the paradigm.

Kuhn believed that the cultural dimension to the paradigm concept was both the least understood and most important sense of the term. He is more recently (but not uncontroversially) being interpreted as a postmodern theorist, in that he sees culture as having a constitutive rather than auxiliary role in the defining of a discipline. The relative importance of culture compared to other constitutive factors is emphasised but not precisely quantified by Kuhn. According to Poltnitsky:

No paradigm, no shift of paradigm and no incommensurability of paradigms can be rigorously considered outside their constitutive cultural frameworks, even though Kuhn may not have taken this point to its ultimate limits.<sup>34</sup>

By far the most commonly cited and applied of Kuhn's articulations of the concept is that: 'A paradigm is what members of a scientific community, and they alone, share'.<sup>35</sup> This means that the paradigm is discipline-specific and unique to that particular discipline. An adversarial system of litigation, for example, if it is referable to a paradigm, is something different to any other adversarial system or to any other system of litigation. Since a paradigm is discipline-specific and unique, it is also exclusive of any other proposed paradigm. Kuhn suggests that the canonical literature, methodologies and practices of a paradigm serve for a time (meaning for the life of the paradigm) to implicitly 'define the legitimate problems and methods of a research field for succeeding generations of practitioners'.<sup>36</sup> Paradigms have done this, Kuhn observes, because they share two essential characteristics:

Their achievement was sufficiently unprecedented to attract an enduring group of adherents away from competing modes of scientific activity. Simultaneously, it was sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve.<sup>37</sup>

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<sup>34</sup> Poltnitsky, above n 24, 204.

<sup>35</sup> Thomas Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (1977).

<sup>36</sup> Note that in SSR, Kuhn frequently refers to those who work in a particular science or discipline as 'practitioners', a protocol that will be followed here.

<sup>37</sup> SSR 10.

One popular online dictionary gives a useful definition of paradigm (and one that captures the sense that is alluded to in this canonical articulation) as: 'A set of assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them, especially in an intellectual discipline'.<sup>38</sup> That set of assumptions, concepts, values and practices becomes paradigmatic when it is able to solve problems that the current set cannot. That is, what really defines a paradigm is its ability to convince the members of a discipline or profession to look at the world in a different way, as a result of an increased ability to solve intractable problems within the discipline. As explained in the next section, we cannot fully explain what a Kuhnian paradigm is without understanding how they change or 'shift' within a discipline.

## **2.3 The Nature of Paradigm Shifts—Normal Science, Crisis and Revolution**

The true nature of a Kuhnian paradigm is best revealed by an examination of how paradigms change or shift. Kuhn believes that crises are a necessary, but not sufficient, precondition for the emergence of new theories. They are not sufficient because the mere appearance of anomalies does not spur the rejection of a paradigm. Practitioners do not, according to Kuhn, renounce a paradigm that led them into a crisis, even as they lose faith in it and consider others. A paradigm is only rejected if

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<sup>38</sup> *The American Heritage Dictionary of the English Language* (4th ed, 2009). This is a useful definition in that it highlights both the idea of shared, assumed practices and of the need for paradigmatic exemplars that are used as benchmarks for proposed problem solutions. Another useful common use definition is 'an intellectual framework of shared preconceptions and governing ideas which shapes research and analysis': *The Macquarie Dictionary Online*. Yet another non-academic definition that does, however, capture some of the flavour of the importance of worldview: 'A mind-set. A formed opinion. A way of seeing the world. A particular way of thinking. A fixed pattern or model. Your current viewpoint and process from which your mind analyses information': <<http://www.brainstorming.co.uk/tutorials/definitions.html>>.

there is an alternative paradigm ready to take its place. The critical feature of this reality, according to Kuhn, is that the decision to reject a paradigm is not made solely on the basis of a failure to explain observations, experimental data or experience, but also on how it compares to the potential replacement paradigm.

Kuhn uses the so-called Copernican Revolution as an illustration. This was the shift away from the Ptolemaic model of the movement of stars and planets, which was based on the assertion that the Earth was the centre of the observable universe, to the Copernican model, which held that the planets in our solar system orbited the sun. This fundamental change in worldview did not provide for greater accuracy in predicting the position and movement of heavenly bodies for practical purposes, such as navigation. In fact, the Ptolemaic system is still used to some extent today for some engineering approximations. However, the practical value of the Ptolemaic system masked small errors and discrepancies in predicting planetary position and motion so that they never quite matched exactly with the most careful observations. Kuhn describes the way those discrepancies were dealt with in this way:

Given a particular discrepancy, astronomers were invariably able to eliminate it by making some particular adjustment to Ptolemy's system ... but as time went on, a man looking at the net result of the normal research effort of many astronomers could observe that astronomy's complexity was increasing far more rapidly than its accuracy and that a discrepancy corrected in one place was likely to show up in another ... because the astronomical discipline was repeatedly interrupted from outside ... and in the absence of printing, communications between astronomers was restricted, these difficulties were only slowly recognised.<sup>39</sup>

It would be difficult for a replacement paradigm to gain traction, because the natural response to anomalies, among practitioners within a given field, is to try and make ad hoc adjustments to the theory/paradigm to attempt to cater for the anomalies. Kuhn discusses individual scientists

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<sup>39</sup> SSR 68. Kuhn cites John Dreyer, *A History of Astronomy from Thales to Kepler* (2<sup>nd</sup> ed, 1955) chs XI–XII, as his source for this assessment.



who have left their vocation because of a perception that the discipline is unable to tolerate crisis or to acknowledge true anomalies. That, says Kuhn, is the only sort of paradigm rejection that can occur where the only stimulus for paradigm change is the emergence of counter-instances.<sup>40</sup>

Most of the so-called theoretical research related to a discipline, according to Kuhn, is simply a process of fine-tuning the blueprint of the field—a period that Kuhn refers to as normal science. This involves what he calls puzzle solving. Kuhn deliberately avoids calling it problem solving, because the finding of a solution is basically guaranteed within the parameters of the current paradigm, it is just a matter of moving the pieces around according to those methods and techniques that are consistent with the existing paradigmatic method. A puzzle-solving practitioner during a period of normal science is never working in completely novel or uncharted territory.

A judge sentencing a drug offender in a mainstream court, for example, tries to construct the appropriate penalty based on existing precedents and legislative principles—they are not expected to design a judicially supervised program that will address the offender's substance abuse. The latter function would not be a puzzle-solving duty that can be informed by the usual adversarial principles of sentencing. During a period of normal science, a cumulative body of knowledge and precedent develops, but the cumulative pool is of little use to the practitioner facing novel problems that appear anomalous under the existing paradigm. Thus, a mainstream judge who was expected, as their primary duty, to try and promote change in an offender would represent an anomaly (according to Kuhn) and thereby contributing to a crisis within the discipline.<sup>41</sup>

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<sup>40</sup> SSR ch VIII 'The Response to Crisis'.

<sup>41</sup> Recall the warning of Anthony Mason, for example, cited in Chapter 1, to the effect that:

to treat court adjudication as if it is something less than the main game ... is to turn constitutional tradition on its head. Courts are courts; they are not general service providers who cater for 'clients' or 'customers' rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their 'clients' and their 'customers' will regard them, correctly in my view, as something inferior to a court.

The fact that judges within the various drug court jurisdictions in Australia do adopt this as their primary role, and do so with legislative sanction and approval,<sup>42</sup> represents an anomaly within what we might call a period of normal science (adversarially informed judging), to the extent that adversarialism cannot explain what it is that the drug court judge is actually doing. Kuhn asserts that:

Paradigms gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognise as acute. To be more successful is not, however, to be either completely successful with a single problem or notably successful with any large number. The success of a paradigm is ... largely a promise of success discoverable in selected and still incomplete examples.<sup>43</sup>

Copernicus held that no system as cumbersome and inaccurate as the Ptolemaic could possibly be a true representation of nature. This crisis, the increasing discrepancy between theory and observation that was accelerated by the invention of more accurate and sophisticated telescopes and measuring instruments, was a prerequisite to Copernicus' rejection of the Ptolemaic paradigm and his search for a new one.<sup>44</sup>

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Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th Annual AIJA Conference, Adelaide, Spring 1999) 5 <<http://www.aija.org.au/online/mason.rtf>>.

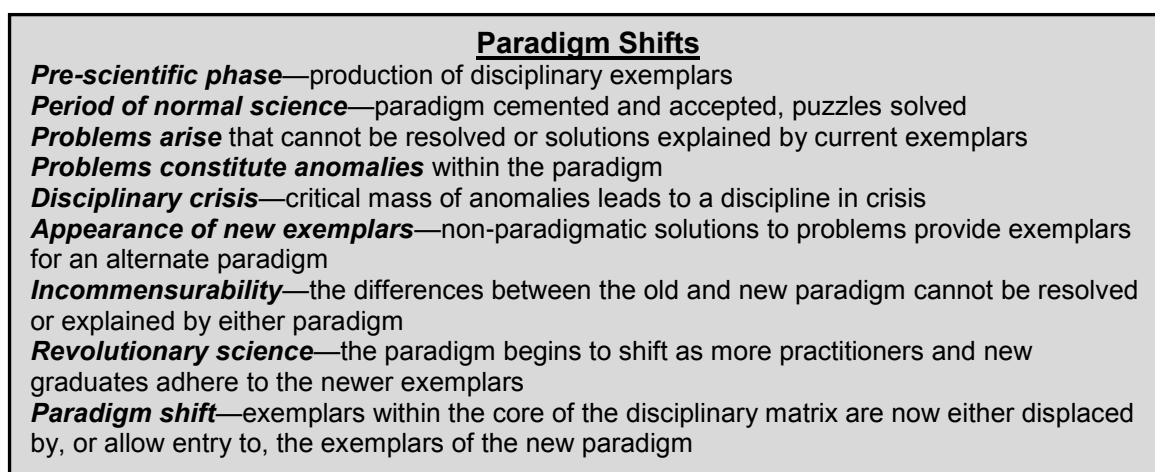
<sup>42</sup> *Drug Court Act 2000* (Qld) s 3 provides, for example, that the objects of the Act are mostly to do with issues of public health and 'treatment' of those who appear before the court. These include: (a) to reduce the level of drug dependency in the community and the drug dependency of eligible persons; (b) to reduce the level of criminal activity associated with drug dependency; (c) to reduce the health risks associated with drug dependency of eligible persons and (d) to promote the rehabilitation of eligible persons and their re-integration into the community.

<sup>43</sup> SSR 24.

<sup>44</sup> The existence of an alternative paradigm, as will be discussed in later sections, is in and of itself not a sufficient condition for paradigm shift; sociological and cultural factors both within and outside the discipline are, according to Kuhn, necessary precursors to change.

Kuhn rejects, however, the image of the lone scientific revolutionary (like Galileo or Copernicus) who turns orthodox worldviews on their heads. Most scientists (and practitioners of a discipline) are narrowly trained experts who focus on solving the puzzles they are confronted with until too many anomalies appear. A problem for a discipline, according to Kuhn, is that which appears to be just like any other puzzle to be solved by applying current methods, but which over time proves to be resistant to solution. Where a solution does appear to be found, it is unable to be explained according to those existing methods and their informing principles—hence, it is anomalous. Once too many such anomalies appear, then the paradigm is in crisis—and only at that point will there be a legitimate normative discourse about the future direction of the field.<sup>45</sup>

The paradigm moves from crisis to revolution when a viable alternative paradigm is found to unite the revolutionary threads that have arisen in response to the crisis, and a generation of practitioners accepts the exemplars of the new paradigm as orthodoxy.



**Figure 2.2: Paradigm shifts**

<sup>45</sup> This is how the current relationship between adversarialism and therapeutic jurisprudence (either of itself or as part of a wider non-adversarial agenda) is characterised by this thesis. The therapeutic jurisprudence literature indisputably represents an extensive normative discourse about the future of the legal system.

This process is not (and probably cannot be) sudden. We do not see any demarcation lines where one paradigm ended and another emerged. A key explanation for that, asserts Kuhn, is an observed cultural reality that people who are generally new to the field, or whose work has previously been in a different or related field, often make the breakthroughs that solve problems and, therefore, resolve anomalies. However, these are not the people who sway the culture of an entire field, at least not in a short time. In examining some examples of those who have made breakthroughs that have eventually led to changed worldviews and paradigms, Kuhn says:

obviously these are the men who, being little committed by prior practice to the traditional rules of normal science, and are particularly likely to see that those rules no longer define a playable game and to conceive another set that can replace them.<sup>46, 47</sup>

In this vein, we could ask whether a therapeutic paradigm could unite (or provide exemplars for) some divergent strategies that have arisen in response to some seemingly intractable problems with adversarialism (such as its perceived inability to meaningfully address problems of recidivism among criminal offenders).<sup>48</sup> Fuller describes the process in this way:

In practice, this means that an inter-generational shift occurs, whereby new scientific recruits are presented with a history that

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<sup>46</sup> SSR 90.

<sup>47</sup> As will be discussed in Chapter 5, the founders of the therapeutic jurisprudence movement, David Wexler and Bruce Winick, came from a psychiatry background and were initially concerned with advocating for change in how the courts dealt with people suffering from psychiatric problems. Neither of these men would claim that therapeutic jurisprudence represents a set of rules that can replace the adversarial system, but this is not required for paradigm shift. Much of the existing disciplinary matrix is usually retained when paradigm shifts, but the key exemplars change.

<sup>48</sup> The literature on the extent, nature, causes and history of recidivism is legion. For a relatively recent indication of the extent and intractability of the problem see Talina Drabsch, 'Reducing the Risk of Recidivism' (Briefing Paper 15/06, NSW Parliamentary Library Research Service, 2006), in which the author finds that approximately 60 per cent of people currently in custody in Australia have previously served a period of imprisonment.

has been rewritten to make the new paradigm look like the logical outgrowth of all prior research in the field.<sup>49</sup>

Indeed, when it comes to therapeutic jurisprudence, this process is probably already quite visible in the calls, not for more problem-solving courts, but for the morphing of existing mainstream courts from adjudication to problem-solving tribunals.<sup>50</sup> A Kuhnian analysis would characterise a problem-solving process or practice in a specialist court, informed by therapeutic jurisprudence as an exemplar.

Practitioners within a discipline need to see themselves as more than just applicators of a particular puzzle-solving method. They are prepared by their educators and mentors to contribute to the completion of the worldview that is assumed by their current paradigm. Interestingly, although SSR was written by use of examples from the physical sciences, these disciplines are those that have paid least attention to Kuhn. The most vigorous attempts to integrate Kuhn's views into the analyses of the structure and dynamics of particular disciplines have come from the social sciences and the humanities.<sup>51</sup>

As noted above, Kuhn held that an epistemological paradigm shift<sup>52</sup> occurs when sufficient anomalies arise that cannot be explained by the existing paradigm within which the relevant field of enquiry or discipline has so far

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<sup>49</sup> Steven Fuller, *Kuhn vs Popper* (2003).

<sup>50</sup> Although the more recent therapeutic jurisprudence literature would probably prefer the descriptors of 'solutions-focused' or 'outcomes-focused'. This theme is largely driven by Michael King, 'Should Problem Solving Courts be Solution-Focused Courts?' (2011) 80 *Revista Jurídica de la Universidad de Puerto Rico*. The essential difference in terms, according to King, is that a 'solution-focused' approach supports participants' own change processes, facilitating their involvement with treatment and support agencies as needed.

<sup>51</sup> Fuller, above n 49, 21. Fuller is not particularly sanguine about the process of applying the Kuhnian principles of the social sciences, as is discussed (and responded to) further below.

<sup>52</sup> This he popularised as 'a scientific revolution'. The shift is epistemological because the fundamental change is about what we consider to be the core knowledge of the system.

progressed. A shift to a therapeutic paradigm, therefore, could occur at the point where the adversarial paradigm is no longer able to cope with the number of anomalous practices occurring in the courts (in the sense of not providing a satisfactory explanation in the form of accepted exemplars for these practices). As will be discussed in Chapter 5, there are a growing number of non-adversarial practices currently appearing in mainstream civil courts, many of which expressly claim to be based on therapeutic principles and which cannot be explained by reference to adversarial exemplars.

This thesis will argue (in Chapter 6) that these practices and responses are not yet widespread enough to constitute an identifiable paradigm shift, although they do provide some evidence of a Kuhnian crisis within the discipline, which may lead to a revolution.<sup>53</sup> A revolution within a discipline is not, according to Kuhn, a dispute between an obviously right group on one side and an obviously mistaken group on the other. This is because the paradigm itself is in dispute and since the paradigm provides the only method accepted by the discipline for resolving disagreements about the meaning of data, results or methods, a quick and objective judgment about which paradigm should succeed is impossible.<sup>54</sup>

This revolutionary period in the discipline (and this thesis characterises the confrontation of adversarial justice with therapeutic justice as at least approaching a revolution in the Kuhnian sense) is more akin to the pre-paradigmatic phase in the early days of a science or discipline than to a

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<sup>53</sup> See, eg, Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93.

<sup>54</sup> For example, a disagreement about the relative effectiveness of a particular court that has a high clearance rate and low appeal rate for criminal matters, but that seems to have negligible effect on recidivism rates, or in addressing the underlying causes of individual offending in the community within which it operates, cannot really be objectively settled at the moment, according to the position taken in this chapter and in Chapter 6, because the adversarial paradigm is under dispute.

period of normal science.<sup>55</sup> In the pre-paradigmatic phase, 'the fundamentals are in question, there are meaningful possibilities of fundamental novelty, there is a lack of focus and a sense of casting about within the community'.<sup>56</sup> As will be discussed in Chapter 4, however, the genesis of the common law legal system in the Western world as a fundamentally pragmatic institution implies that there was no sharply identifiable pre-paradigmatic phase.

We ought not to take too far the analogy of a dispute between groups of practitioners and theoreticians within a discipline about a fundamental theoretical framework being akin to a political revolution. Although Kuhn himself uses the term 'revolution' cautiously, a few contemporary critics claim that he used this rhetoric a little too enthusiastically and hence promoted some misunderstanding. Revolutions within an academic discipline that lead to paradigmatic change are not quick, clearly defined or conceptually neat. The analogy simply reminds us that the debate or conflict between advocates of a theoretical status quo (in our case of the adversarial system) and their revolutionary counterparts (the more ambitious advocates of therapeutic jurisprudence and non-adversarial justice, if we agree to provisionally characterise them as such) cannot be resolved by a neutral and authoritative adjudicator according to Kuhn.

Indeed, it may not even be obvious that there are distinct groups of opposed individuals. This is a crucial caveat from Kuhn. In a revolutionary phase, where members of the judiciary, the legal academy and the legal

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<sup>55</sup> However, in the revolutionary stage there is no returning to a pre-paradigmatic stage that involves some sense of starting completely afresh and redefining the whole discipline. This is obviously always going to be the case with something as entrenched as the juristic model, which is so intimately linked with other major public institutions.

<sup>56</sup> Sharrock and Rupert, above n 25, 46. It is not too much of a stretch, I suggest, to how in recent years the fundamentals of the adversarial system are increasingly questioned, how we are seeing some meaningful and novel alternatives in legal practice and how there is some obvious casting about for new ways to resolve intractable problems in the legal and justice system.

profession are arguably split with government policy makers as to the future of adversarialism as the dominant paradigm, there is nobody left to referee. This is the phenomenon that Kuhn labels incommensurability. All have a vested interest and, in any case, a paradigm shift is only really recognised in a historical sense. To those operating within a paradigm, during a period of normal science, the current paradigm will appear to be the culmination of all that came before it, rather than as a split with the past.

Kuhn is at pains to point out that unlike a political revolution, a revolution in an academic discipline is not ultimately a matter of individual choice. Although individual practitioners can and do change perspectives, a paradigm shift is not fundamentally driven by individuals changing allegiances or being convinced that the new paradigm is preferable. In fact, many practitioners never switch sides at all. The groundswell of change needed to truly shift a paradigm comes from those who are trained in the new paradigm and who shape their careers according to it.<sup>57</sup> Those who do drive innovation are not likely to be changing allegiances or worldviews as they are likely to have never been committed to the orthodox paradigm in the first place. It is entirely possible that the pioneers of a new paradigm might be unaware, or even resistant to, the fundamental status of their work. I consider this possibility in more depth in Chapter 5.

By way of example, the founders of quantum theory—Planck, Einstein and Schrodinger—never fully accepted that quantum theory represented a new paradigm or worldview. They maintained that the uncertainty principle was a characteristic of observation rather than of the physical universe. Einstein was never satisfied by what he perceived to be quantum theory's intrinsically incomplete description of nature, even making attempts in his

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<sup>57</sup> Kuhn often cites the observation of Max Planck that 'a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it': Max Planck, *Scientific Autobiography and Other Papers* (Frank Gaynor trans, 1949) 33.



earlier work to disprove the uncertainty principle.<sup>58</sup> He proposed that it ought to be possible, in principle, to determine both the velocity and direction of movement of a subatomic particle without thereby disturbing the particle, and for that reason the particle would have ‘real’ values of position or momentum. However, experiments have continually shown that this principle is inconsistent with the behaviour of subatomic particles. Einstein was arguing that quantum mechanics could not possibly be a complete, realistic and local representation of phenomena, given specific definitions of ‘realism’, ‘locality’, and ‘completeness’.

If one examines the transcripts of the regular public debates between Einstein and Bohr about the extent to which the physical universe is in fact subject to quantum principles, it is clear that Einstein was so steeped in the existing scientific culture and worldview in which he was educated that it was impossible for him to accept the ultimate implications of the paradigm-changing research that he largely pioneered. His conceptions of realism and completeness were deeply entrenched in modernity.<sup>59</sup> The worldviews of modernity and liberalism have, similarly, strongly influenced the character of the normative debates about the shelf life of adversarialism.

Kuhn’s view is that theories (as distinct from paradigms)<sup>60</sup> are comprehensive models of reality that give meaning to facts or

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<sup>58</sup> Gerald Holton, *Einstein, History, and Other Passions* (1996) 177–93.

<sup>59</sup> This is why in the discussion of ‘how therapeutic jurisprudence sees itself’ in Chapter 5 we should not arbitrarily limit the potential of therapeutic jurisprudence to provide at least some paradigmatic exemplars to the disciplinary matrix of a possible non-adversarial paradigm, simply on the basis that some key therapeutic jurisprudence advocates do not yet see them as such.

<sup>60</sup> Kuhn preferred to use the term ‘disciplinary matrix’ instead of ‘theory’. He held that ‘theory connotes a more limited structure than what he had in mind as the larger conceptual framework within which paradigms sit. At SSR 182 he notes that: ‘I suggest “disciplinary” because it refers to the common possession of the practitioners of a particular discipline; “matrix” because it is composed of ordered elements of various sort, each requiring further specification’.

observations—a theory operates to retrospectively explain a system rather than being something that is a natural outcome of the system or observations. This means that we would see a science, or in this case, the legal system, as a succession of self-contained paradigms that operate to serve the needs of the community rather than as a series of gradually more accurate approximations of what the legal system ought to be in order to be closer to an ideal or truth.

One implication of this view is that a shift from an adversarial to a therapeutic paradigm would likely involve a change of balance in the composition of the legal profession rather than a set of rational choices by existing practitioners or a decision by the profession as a whole to change paradigms. Paradigm shift is not the manifestation or end result of a set of rational and conclusive debates. To that extent, research (such as that undertaken in part in this thesis) about the dynamics of a purported paradigm shift will not be designed to try and sway opinion about the value of a new paradigm; rather, it will describe how the fundamental theoretical framework might change as a result of a shift and what the implications are for the practice of law. In other words, it detects and analyses change rather than advocating for it.<sup>61</sup>

Kuhn certainly allows that debate will abound during a revolutionary phase, but claims that the new paradigm succeeds because those who adopt it are systemically influential and end up dominating the academic discourse and, therefore, indoctrinating the new generation of practitioners with the new paradigm. In the 1969 postscript, he makes this observation:

Both normal science and revolutions are, however, community-based activities. To discover and analyse them, one must first unravel the changing community structure of the sciences over time. A paradigm governs, in the first instance, not a subject matter but rather a group of practitioners. Any study of paradigm-

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<sup>61</sup> See, eg, Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy and Law* 193.

directed or paradigm-shifting research must begin by locating the responsible group or groups.<sup>62</sup>

This is why Kuhn eventually describes a paradigm as a ‘constellation of group commitments’.

Further, Kuhn was sceptical of the extent to which debates during a paradigm shift involved actual and direct, rational disagreement compared to something more akin to a religious dispute involving talking over each other, arguing in circles and begging the question.<sup>63</sup> We see the circular nature of some arguments between therapeutic jurisprudence advocates and their critics quite often, since each side appeals to principles and goals that the other rejects as being fundamental or definitive in some way.<sup>64</sup> For example, it is hard to find common ground about an argument that a particular legal practice ought to be reformed on the grounds that it has anti-therapeutic consequences if the other party disputes the meaningfulness of the anti-therapeutic descriptor. In this vein, Roderick and Krumholz assert that:

We contend that therapeutic jurisprudence, as a ‘school of social enquiry’ must establish specific and precise conceptual and theoretical constructs prior to the application of its principles to ‘therapeutic’ movements in the criminal justice and overall legal systems. One cannot ascertain the benefits of problem-solving courts or therapeutic lawyering techniques if one has not established the validity of therapeutic jurisprudence as a theoretical construct.<sup>65</sup>

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<sup>62</sup> SSR 179–80.

<sup>63</sup> Ibid 94.

<sup>64</sup> I consider this assertion in terms of some of the harsh judicial criticisms of therapeutic jurisprudence and problem-solving courts in Chapter 6.

<sup>65</sup> Dennis Roderick and Susan Krumholz, ‘Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence’ in MF Miquelon-Weismann (ed) *Trends and Issues in Scientific Evidence* (2007) vol 1, 201. The search for precise meanings to terms such as ‘therapeutic’, ‘well-being’ and ‘happiness’ has dogged researchers in psychology and other social sciences for decades. This does not mean that a failure to define as precisely as critics demand is a failure of theory. A good recent example of an attempt to reconcile this sort of critique and purported definitional ‘vagueness’ is undertaken in Eranda Jayawickreme, Marie Forgeard and Martin Seligman (2012) 16(4) *Review of General Psychology* 327. There the authors note that ‘[t]he intuitive appeal of constructs

This assertion is somewhat ironic given that there is certainly a lack of evidence for any coherent or systematic attempt to 'establish specific and precise conceptual and theoretical constructs prior to the application of its principles' in relation to the adversarial paradigm, as will be discussed in Chapter 4. If that is to be the relevant benchmark, then adversarialism could well be seen as lacking this same sense of validity. The adversarial system of litigation seems to have developed according to quite pragmatic imperatives rather than as the manifestation of some carefully considered theoretical position. Such debates, based on mutual assertions of a lack of 'precise conceptual and theoretical constructs', appear to be exactly what Kuhn suggests characterise the revolutionary stage that occurs during a paradigm shift within a discipline.

## **2.4 Paradigms in the Social Sciences and Humanities—The Importance of Worldview**

In this thesis I conceive of, and refer to, law primarily as a discipline. The 'discipline of law', for the purposes of the thesis, refers primarily to the way law operates in application or practice, but also in conjunction with the academy. Kuhn himself uses the terms 'field' and 'discipline' interchangeably.<sup>66</sup> As indicated in Chapter 1, not much hangs on the parameters of what we refer to as the law for the purposes of the thesis,

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such as happiness, well-being, and quality-of-life are undeniable, but partly as a result of this appeal, a perplexing array of theories of well-being have evolved, each with different biases, core concepts, and purposes'. They acknowledge that this is not unique to psychology by stating that '[t]his is true not only across the social sciences and the humanities, but also within psychology'. Most usefully, they offer this:

Indeed, there is a major dilemma for theorizing about well-being. On the one hand, the study of well-being has been hampered by the multiplicity of theory leading to a blurred and overly broad definition of well-being ... we present the engine model of well-being, a framework that aims to make sense of the multiplicity of theory by organizing the constructs at hand around inputs, processes, and outcomes.

<sup>66</sup> SSR 182.

so long as we acknowledge that when we talk about possible legal paradigms we are referring to paradigms of the same discipline or field.

As discussed earlier, Kuhn acknowledged in the 1969 postscript to SSR that the broader of the two conceptions of the paradigm that he had articulated was one that ‘stands for the entire constellation of beliefs, values, techniques and so on shared by the members of a given community’.<sup>67</sup> That conception seems amply broad enough to draw various conceptions of the law within its ambit. Chapter 3 makes the case that the discipline of law (referred to later in the thesis with more analytic precision as a ‘juristic model’) operates pursuant to a Kuhnian paradigm, but in this section I deal with the more fundamental question of whether it is valid to use the Kuhnian paradigm to describe the structure of disciplines outside of the natural sciences.

In the first edition of SSR, all Kuhn’s examples of paradigm shift involve the natural sciences (such as physics, chemistry and biology). This is unsurprising, given that his work is almost exclusively concerned with the history and internal dynamics of science as a discipline. However, there is a threshold issue of whether his exclusive reference to the natural sciences entails that they, and only they, are disciplines capable of operating pursuant to a Kuhnian paradigm.

Academic disciplines (and the professions they are aligned with) are usually clustered into groups based on commonalities of what is studied and how it is studied. This is both a pragmatically and conceptually reasonable approach given that various disciplines both complement and compete against each other when it comes to attracting students and funding. Some broad groups of disciplines are the natural sciences, the social sciences, the humanities, the professional sciences and the formal

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<sup>67</sup> Ibid 175.

sciences. Although these clusters are widely accepted and made use of, they are somewhat ad hoc.<sup>68</sup>

In their analysis of the extent to which Kuhn has been cited in academic literature, Loving and Cobern found that only 8 per cent of citations of SSR occur in natural science journals. Significant numbers of citations come from law (14 per cent), psychology (13 per cent) and political science (10 per cent).<sup>69</sup> Their study also revealed that one of the seminal handbooks of qualitative research in science disciplines<sup>70</sup> indexes 'paradigm' on 51 pages but 'Kuhn' on only six, suggesting that the concept of the paradigm has moved on with a life after Kuhn. In fact, the authors indicate:

We note that well known figures in the research community of the social sciences whose earlier, foundational work cited Kuhn heavily as providing the very context and justification for their views are now themselves cited heavily rather than their philosophical mentor Kuhn.

According to Garfield, SSR was the most cited source in the arts and humanities between 1976 and 1983. Given that it was first published in 1962, the 14-year gap illustrates the delay in the take-up of the paradigm concept from the natural sciences to the other disciplines.<sup>71</sup> Although Kuhn originally intended the concept of the paradigm to apply solely to the hard (physical) sciences, he and subsequent philosophers of science<sup>72</sup> have to some degree approved of its use in other disciplines and fields. This broader context will be discussed in Chapter 3 as the thesis attempts to

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<sup>68</sup> See Andrew Abbott, *Chaos of Disciplines* (2001).

<sup>69</sup> Loving and Cobern, above n 5, 198.

<sup>70</sup> Norman Denzin and Yvonna Lincoln, *Handbook of Qualitative Research* (1994).

<sup>71</sup> Viola Garfield, 'A Different Sort of Great Books List: The 50 Twentieth-Century Works Most Cited in the *Arts & Humanities Citation Index*, 1976–1983' (1987) 16 *Current Contents* 3.

<sup>72</sup> Including most notably his dialectic opponents Karl Popper, Imre Lakatos and Paul Feyerabend.

establish that it is legitimate to conceive of juristic models as paradigms in the Kuhnian sense.<sup>73</sup>

Unsurprisingly, Kuhn's thesis of disciplinary change as articulated in SSR garnered some support from the postmodern and poststructuralist academic communities due to its emphasis on the cultural dynamics and worldviews of those within the discipline, rather than on rigorous application of the internal (and ostensibly) objective methodology of the discipline. Once the drivers of disciplinary change are isolated from the workings of the scientific method, a deep enough wedge is driven into traditionally conceived conceptual differences between the sciences and other academic disciplines, this chapter argues, to allow Kuhn's work to be applied outside the natural sciences.

Kuhn conceived of the development of disciplinary knowledge as occurring in periodic, spasmodic 'revolutions', which was not a process of more refined theory converging on some sort of truth, but one of the replacement of an older order within the discipline with new ones. These orders are what he conceives of as paradigms. That is, within a discipline, social and political acceptance is as important as the viability of the practical theorems and exemplars that they use to solve puzzles within the discipline. A lone researcher who comes across a startling new discovery that answers seemingly intractable problems in a given field will have little or no effect, according to Kuhn, unless other (influential) colleagues champion the discovery. Revolutionary discoveries in science, he argues, are rarely recognised as such at the time they are made. Ingrained logical structures within a discipline are what practitioners see when they look at the history of their field, but the interaction and professional goals of the practitioners themselves are crucial.

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<sup>73</sup> After this chapter, the assumption is made that law may be classified as either a social science or one of the humanities and that it is legitimate to claim that the disciplines that comprise these areas can be informed by Kuhnian paradigms.

Kuhn does not go so far as to suggest that theories in science are mere social constructs or that science, therefore, cannot claim to have good insights into objective reality. Science generally works and has produced myriad practical benefits. It would be wrong, for instance, to hold that Kuhn was a postmodernist. He does not assert that what is real or objective for a scientist depends wholly or even largely on political and economic conditions or on the worldview of the practitioner. We do not find an agenda, within Kuhnian scholarship, for assessing leading scientists who have made breakthroughs to look for their connections to issues of gender, sexual orientation, race or class. As will be seen near the end of this chapter, later philosophers of science more closely aligned with the postmodern movement, such as Paul Feyerabend, argued that scientific theories were incoherent and that other forms of knowledge production, such as religion and popular consensus, could be as valid in addressing the material and spiritual needs of their practitioners as scientific doctrine.

Given that the logical positivists objected to Kuhn's denial of the internal logical and structural consistency of a discipline's content as the primary driver of change, and the poststructuralists' charge that SSR is indefensibly eurocentric (in that its focus on the personalities and cultural milieu of a discipline allegedly marginalises the scientific traditions of other cultures as necessarily incommensurable with those of the West), there is clearly intellectual scope to at least attempt an application to disciplines outside of science.<sup>74</sup>

The overuse of the terms 'paradigm' and 'paradigm shift' in popular culture, in academic journals and in fields of human endeavour that bear little procedural resemblance to the sciences with which Kuhn mostly concerned himself, warns against a simple assertion that SSR is relevant outside the hard sciences. These terms are so often used in shallow and clichéd ways that their use imports virtually nothing from Kuhn. A paradigm is more than the currently dominant exemplar underpinning a discipline: it

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<sup>74</sup> See Arun Bala, *The Dialogue of Civilizations in the Birth of Modern Science* (2006).



is a reflection of a particular worldview within which that exemplar connects to other disciplines and other types of human experience (such as politics, economics and ethics) and from which it draws its authority and normative force. Given the interrelatedness and symbiotic nature of the relationship between the common law legal system and other liberal institutions of governance, there is little point, therefore, in trying to conceive of a legal paradigm being a standalone phenomenon either.

Kuhn devotes a whole chapter of SSR to the importance of worldview in paradigm shifts.<sup>75</sup> He claims that led by a new paradigm, scientists adopt new instruments to look in new places and ‘the historian of science may be tempted to exclaim that when paradigms change, the world itself changes with them’.<sup>76</sup> Since scientists see the world through the lenses of their disciplines, so the argument goes, this is understandable. This is why, Kuhn suggests, the familiar demonstrations of a switch in visual gestalts prove so compelling or novel (such as that of the duck and the rabbit excerpted above).

Social science has enthusiastically adopted the relationship between a paradigm and a worldview. In the relevant literature, the nature of a worldview is often discussed by reference to the *Weltanschauung*—‘the fundamental cognitive orientation of an individual or society encompassing natural philosophy, fundamental existential and normative postulates or themes, values, emotions, and ethics’.<sup>77</sup> This can be more simply expressed as the set of experiences, beliefs and values that affect the way an individual or community perceives reality and responds to that perception. In the social sciences, and in some jurisprudential research, paradigm shifts within a particular discipline are said to be inevitably related to shifts in how a community or society goes about organising and understanding reality.

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<sup>75</sup> SSR ch X ‘Revolutions as Changes of Worldview’.

<sup>76</sup> Ibid 111.

<sup>77</sup> Gary Palmer, *Toward A Theory of Cultural Linguistics* (1996) 114.

Since multiple paradigms within a given discipline would be, by definition, incompatible, one must be dominant at any given time. A dominant paradigm is usually recognised by reference to a number of essential characteristics. In Chapter 4, for instance, the argument is made that adversarialism represents the current legal (juristic model) paradigm in Australia. Social scientists suggest that paradigms that are either dominant, or approaching dominance, can be identified according to characteristics and indicators such as:

- Professional organisations that give legitimacy to the paradigm.
- Dynamic leaders who introduce and purport the paradigm.
- Journals and editors who write about the system of thought. They both disseminate the information essential to the paradigm and give the paradigm legitimacy.
- Government agencies who give credence to the paradigm.
- Educators who propagate the paradigm's ideas by teaching it to students.
- Conferences conducted that are devoted to discussing ideas central to the paradigm.
- Media coverage.
- Lay groups, or groups based around the concerns of lay persons, that embrace the beliefs central to the paradigm.
- Sources of funding to further research on the paradigm.<sup>78, 79</sup>

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<sup>78</sup> ML Handa, 'Peace Paradigm: Transcending Liberal and Marxian Paradigms' (Paper presented at the International Symposium on Science, Technology and Development, New Delhi, India, 20–25 March 1986). A useful example of how researchers within a particular social science discipline have attempted to explicitly map the history of their discipline against the Kuhnian process is the rise of action learning in management education in the 1990s. See Hugh McLaughlin and Richard Thorpe, 'Action Learning—A Paradigm in Emergence: the Problems Facing a Challenge to Traditional Management Education and Development' (1993) 4 *British Journal of Management* 19.

<sup>79</sup> Examples of how therapeutic jurisprudence and other lenses and vectors within a potential therapeutic paradigm can readily be aligned with these criteria will be provided in chapters 5 and 6.

As will be further asserted and discussed in Chapter 4, the adversarial paradigm, if there is such a thing, is grounded in a long-established political and economic, liberal worldview, which holds that personal liberty and well-being are best obtained and maintained by competition, freedom to contract and the enforcement of personal rights as the primary means of dispute resolution and of promoting social cohesion. Within this worldview, some scholars argue that legal adversarialism and a culture of conflict have become seen as not only endemic but as paradigmatic, to the extent that to question them is to attack the very core of modern liberal society.<sup>80</sup>

[A]dversarialism has become the predominant strand in contemporary western-liberal societies ... Throughout the contemporary public sphere, competitive and conflictual practices have become institutionalized norms ... Because of this it is often difficult for people to envision alternatives ... a proper accounting should reveal that while oppositional strategies have reached a point of diminishing returns, non-adversarial strategies are emerging as the most effective methods for lasting social change in an age of *heightened social and ecological interdependence*.<sup>81</sup>

This worldview manifests itself in the legal system, asserts Karlberg, due to the prevalence of a 'normative adversarialism'—the assumption that contests are 'normal and necessary models of social organization'.

Similarly, Anand argues that a liberal *Weltanschauung* underpins the adversarial legal system to such an extent that no sense can be made of it outside of the traditional liberalist political philosophy and that the assumption is that the liberal political order, with its almost exclusive focus on the rights and liberties of the individual as the benchmark for human flourishing, is the most natural for human societies.<sup>82</sup> Because it is the

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<sup>80</sup> An analysis of the relationship between legal adversarialism and laissez faire liberal worldviews can be found in Michael Karlberg, *Beyond the Culture of Contest From Adversarialism to Mutualism in an Age of Interdependence* (2004)

<sup>81</sup> Ibid 18.

<sup>82</sup> Rakesh Anand, 'Legal Ethics, Jurisprudence, And The Cultural Study Of The Lawyer' (2008) 81(3) *Temple Law Review* 737.

most natural, it then assumes an aura of inevitability.<sup>83</sup> The extent to which this represents a significant difficulty for those who advocate a shift away from an adversarial legal paradigm is something that will be addressed in chapters 4 and 5.

An indication of the depth of concern that some judicial critics have about the extent to which therapeutic jurisprudence purportedly diverges from broader liberal principles is evident in statements such as this from US District Court Judge Morris Hoffman:

If therapeutic jurisprudence were just a trendy idea that did not work, we could let it die a natural death. But it is not just trendy and ineffective, it is profoundly dangerous. Its very axioms depend on the rejection of fundamental constitutional principles that have protected us for 200 years. Those constitutional principles, based on founders' profound mistrust of government, and including the commands that judges must be fiercely independent, and that the three branches of government remain scrupulously separate, are being jettisoned for what we are led to believe is an entirely new approach to punishment.<sup>84</sup>

Anand indicates that a liberal worldview is contingent rather than inevitable and that the sort of social and political framework for legal thought developed by the social contractarian scholars in early jurisprudence (such as Rawles) is far less compelling now than in their day:

A particular *Weltanschauung* speaks to a specific understanding about the nature of man, the nature of the world ... As the term itself implies, and as is perhaps immediately evident, a particular worldview is both historically and culturally contingent in character ... liberalism begins with a belief in the primacy of the individual and in the goodness and inevitability of change. It is only within the context of this *Weltanschauung* that one can really take hold of liberalism's various arguments and claims. For example [liberal

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<sup>83</sup> See Francis Fukuyama, *The End of History and the Last Man* (1992). This is a notoriously simplistic, but influential claim, which is strongly rebutted by other authors such as Slavoj Žižek, *Living in the End Times* (2011), who argues that liberal hubris has led to dead-end economic and political processes that are causing global social and cultural divisions that make a liberal order unsustainable.

<sup>84</sup> Morris Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' (2002) 29 *Fordham Urban Law Journal* 2063, 2071.

legal and political philosophy] ... is intelligible only if one *assumes* [emphasis added] the liberal commitment to the individual as a truly autonomous subject and an accompanying political theoretic idealism. Without this perspective (which is certainly not shared by all), the resulting [liberal] principles of justice have limited intelligibility or appeal. If one grasps this state of affairs, one sees that liberalism is conditional, not objective, in nature. Its manifestation requires an epistemic commitment.<sup>85</sup>

In arguing that the liberal democracies have a long history of proselytisation<sup>86</sup> and a belief that their political, and therefore legal, systems are inherently best practice for human well-being, Anand suggests that there is a deeply held faith within liberal institutions, such as the court system, that alternatives are unnecessary. If the paradigm is not broken, so to speak, then do not fix it. Her claim is that:

Only if we acknowledge this condition can we really make sense of liberalism. Once we do recognize that liberal politics begins with a belief system, however, we can push in the direction of an even richer understanding of liberalism, one that places it in the broad, anthropological context of human cultural activity. This picture of liberalism, which captures its essence, in turn generates a powerful account of law, one that, in parallel to the anthropological portrait drawn of liberalism, denotes its fundamental nature.<sup>87</sup>

There is no doubting that the common law legal and judicial system is mired in liberal ideology. There has always been a desire among social scientists to portray and define their fields as mature disciplines akin to the natural sciences, and to characterise them as being currently involved in some sort of paradigm-shifting phase where there is a struggle between whatever theoretical forces are currently publishing their views in that

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<sup>85</sup> Anand, above n 82, 755. As will be discussed in later chapters, the most trenchant liberalist criticism of therapeutic jurisprudence tends to come from members of the US judiciary who take quite conservative views of the constitutional limits of the judicial role. The extent to which these criticisms may apply in the Australian jurisdiction (in respect of Chapter III courts at least) will be specifically addressed in Chapter 5.

<sup>86</sup> Proselytising is the act of attempting to convert people to another opinion and, particularly, another religion.

<sup>87</sup> Anand, above n 82, 760.

discipline's journals.<sup>88</sup> In many instances, these competing theoretical forces are ideologically driven. The problem with ideologically driven theory in the social sciences and their associated professional disciplines is that the ideologies, according to Kuhn, claim to represent not just orthodoxy, but truth.<sup>89</sup> For that reason, their methodologies, models and techniques are based on an assumption of validity—it is only the results and data that may be suspect. Science, according to Kuhn, involves methods, models and conjectures that are always tentative.

The upshot of this analysis, for the purpose of the thesis, is that in a discipline such as law, based on ideology, those who suggest, or advocate for, a paradigm shift may become politically powerful (appealing to those who experience the 'thrill of revisionism') but are condemned to be rationally and instrumentally impotent in the long run. This means that without a shift in underlying ideology, paradigms cannot change.<sup>90</sup>

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<sup>88</sup> Whereas both the early Kuhn and Popper might classify the social science disciplines as being in the pre-science stages.

<sup>89</sup> This criticism is often levelled at both the practice of law and of jurisprudence. Law operates within a fairly precisely defined frame of reference and the traditional (adversarial) lawyer will typically make a determination first as to whether the law is actually relevant to a client's problem and then what meaning the law assigns to the client's situation. Chambliss and Seidman crystallised the early sociological view of the law and of jurisprudence of the time by asserting that jurists assume that 'the prescriptions of statutory law and the common law ... are descriptions of the real world ... The central myth ... is that the normative structures of the written law represent the actual operation of the legal order': William Chambliss and Robert Seidman, *Law, Order and Power* (1971) 3.

<sup>90</sup> There is no doubt that there is a clear distinction between an ideological focus of the law as due process and individual rights on the hand, and with the well-being of litigants and the resolution of problems and healing of relationships on the other. Therapeutic jurisprudence advocates are often at pains to suggest that 'rights trump therapy' where there is a clear conflict, but this assertion (if it is true) seems to be more of an attempt to assuage the concerns of the legal majority rather than an attempt to attain theoretical legitimacy. This will be discussed in more depth in chapters 5 and 6.

Kuhn allows that all paradigms are faced with some level of anomaly, but that these are usually dealt with as ‘acceptable levels of error’ or just marginalised, rejected out of hand or ignored (as was the case in astronomy before the rise of the Copernican model). However, the significance of anomalies varies between practitioners within a discipline. It is as yet unclear, for example, whether the majority of mainstream judges and jurists in Australia, and in other jurisdictions that convene specialist courts, treat therapeutic courts and problem-solving courts as anomalies that are either outside the real court system or as mistaken applications of policy—in effect, as acceptable levels of error. That would allow at least some of these courts to exist<sup>91</sup> without being perceived as an unacceptable ideological indulgence or as a threat to the liberal/adversarial paradigm.

It could well be that the continuation of an adversarial paradigm requires no particular awareness of any alternative. The acceptance and promotion of a paradigm at an individual level does not require that the individual is actually well versed in the underlying orthodoxy of the paradigm. In fact, the relationship between paradigms and worldviews invites either a non-critical meta-perspective or acceptance of the paradigm as a default position. It would not be surprising to hear judges or lawyers declare that they do not operate within any particular theoretical paradigm or from any specific worldview. Northrop explains that reality in this way:

To be sure there are lawyers, judges and even law professors who tell us they have no legal philosophy. In law as in other things, we shall find that the only difference between a person ‘without a philosophy’ and someone with a philosophy is that the latter knows what his philosophy is, and is, therefore, more able to make clear and justify the premises that are implicit in his statement of the facts of his experience and his judgment about those facts.<sup>92</sup>

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<sup>91</sup> Albeit in a rather patronised sense.

<sup>92</sup> FCS Northrop, *The Complexity of Legal and Ethical Experience* (1950) 6.

Lawyers and judges educated without reference to any overt theoretical perspective,<sup>93</sup> or who have avoided reflecting on any theoretical material in their formal study, may well react sceptically to theoretical discussion in general and make the (invalid) assumption that the practice of law is a purely pragmatic affair.<sup>94</sup> If that is the case, then the aim of Chapter 4 of this thesis, to establish that there is an adversarial juristic paradigm consisting of more than simply expedient and traditional pragmatism, is even more important to pursue.

It seems self-evident that there is a strong quality of pragmatism in the law. Jurisprudence has a long and fecund tradition and is a continually developing field, but purely theoretical analyses of law and legal institutions may not be as influential on the real world justice and legal systems as may be the case with the theoretical contexts of other disciplines and professions. Pragmatism, in this sense, means the belief that an ideology, theory or proposition is true if it works satisfactorily, that the meaning of a proposition is to be found in the practical consequences of accepting it and that unpractical ideas should be rejected. The reasons for this are probably two-fold.<sup>95</sup>

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<sup>93</sup> I note that legal theory is not a mandatory area of study within the curricula of many law schools in Australia. Neither is the study of jurisprudence a requirement for entry to the profession in any Australian jurisdiction.

<sup>94</sup> It is worth noting that although the profession of lawyer in the English common law system is over 500 years old, it was not until the end of the 1800s that legal education became available as university level study. Prior to that it was undertaken pursuant to an apprenticeship or indenturing scheme, which continues to some extent today with the articulated clerk process.

<sup>95</sup> As is discussed later in this chapter, the acceptance and rejection of a paradigm by individual practitioners may be influenced by aesthetic, emotional or ideological factors, but although the law is frequently claimed to be overwhelmingly driven by a desire for justice, practicality is generally a paramount consideration when choosing between different legal or policy options. Pragmatism is usually more generally described as a doctrine that prescribes that ideas must be looked at in terms of their practical effects and consequences. A pragmatic analysis of judging, for instance, would hold that the beliefs of a judge about their role and function should be solely identified by observing the actions of the judge and that the judges with the most appropriate beliefs are the ones



First, the law exists to regulate human conduct and human relationships and interactions. For this reason, the law is expected to come up with solutions and resolutions that work in practice and that are not just intellectually tidy or satisfying.<sup>96</sup> Second, the consequences of legal decisions and actions being impractical can be very grave—the lives, liberty and well-being of people and other legal entities are intrinsically connected with legal outcomes and the public are perhaps more concerned with the practical outcomes of the legal system than theoretical coherence.

Claims that Kuhn intended that disciplines outside the natural sciences ought not to be brought within the rubric of the paradigm are misplaced and simply wrong. Kuhn did express puzzlement that academics from disciplines within the arts and the humanities had taken an interest in the concept of the paradigm shift, and he was at pains in the original SSR text to identify what distinguished the natural sciences from other disciplines. However, in the 1969 postscript, Kuhn makes clear that his puzzlement is due to a belief that the process of paradigm change in these other disciplines seems obvious. His claim is that to the extent that SSR portrays scientific development as a succession of tradition bound periods punctuated by ‘non-cumulative breaks’, its theses are of ‘undoubted wide applicability’. He adds that:

Historians of literature, of music, of the arts, of political development, and of many other human activities have long described their subjects in the same way. Periodization in terms of revolutionary breaks in style, taste and institutional structure have been among their standard tools. If I have been original with respect to concepts like these, it has mainly been by applying

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that achieve the best outcomes. One could suggest, perhaps, that in jurisdictions where judges are popularly elected, rather than appointed by the executive, pragmatism may be an even more important element of judicial evaluation.

<sup>96</sup> It is interesting to reflect though on the fact that on paper the justice seems to be fair, equitable and accessible, yet in its practice and application there are significant doubts that this is the case.

them to the sciences, fields which have been widely thought to develop in a different way.<sup>97</sup>

This claim that the evolution of disciplines within the natural sciences might occur for similarly subjective, political and human reasons as those in the social sciences and humanities goes a long way to explaining both the stern resistance towards Kuhn from the hard sciences and the logical positivists, and the excitement with which his work was heralded from without.

This is not to say that Kuhn would have lumped all the academic disciplines together in terms of methodology or development and change processes. He did emphasise that there were elements of the natural science disciplines that seemed to set them apart. He commented on both the apparent lack of competing schools of thought in the 'developed sciences', for example.<sup>98</sup> He also noted that within the natural sciences, the only real audience for a scientist's work were other scientists, and that members of the scientific community were the only real judges of a scientist's work.<sup>99</sup> He does not claim that these factors make science unique, but he does claim that they set those disciplines apart to some extent. Given the extent to which modern communication and publishing modes disseminate information rapidly and widely, especially via digital media, these features of the natural sciences seem much less unique today. Further, there is no claim in SSR that this perceived distance ought to preclude an application of his work to other disciplines, including law. As seen above, quite the opposite is true.

The extent to which the wider academy has (albeit shallowly in most cases) adopted Kuhn's terminology and concepts, and Kuhn's own surprise that practitioners in the social sciences and humanities should think that paradigm shift is not integral to evolution within their own fields,

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<sup>97</sup> SSR 208.

<sup>98</sup> Ibid 209.

<sup>99</sup> Ibid.

is ample evidence that looking for proof of Kuhnian paradigms and paradigm shifts outside the natural sciences is valid.

## 2.5 Incommensurability

In terms of changes in scientific paradigms, Kuhn concluded that history shows that a lengthy period of conflict and instability within a discipline follows the breakthrough and it can take centuries for the new worldview to dominate within culture at large. This sort of revolutionary change is rarely tidy and painless in any sphere of human enterprise or academic discipline. According to Kuhn, a student becomes a scientist or practitioner when they are socialised by the academy into accepting four characteristics of the current paradigm (rather than by learning a collection of formal rules about the discipline). They are:

1. A set of shared symbolic generalisations
2. A common model of reality
3. Shared values as to standards and legitimate procedures
4. Shared exemplars in the form of concrete problem solutions typical of the approach of the relevant scientific/academic community.<sup>100</sup>

When a new paradigm is established, the practitioners behave and think (at least professionally) as though the new worldview is objective reality—an attitude bordering on dogma. It is in this context that the period of normal science, involving mostly puzzle solving, takes place. As will be discussed later, others, most notably Karl Popper, disagreed with this characterisation of disciplinary change. Popper's view was that the best practitioners accept that their conjectures are tentative and that they will be superseded in time. He argued that the Kuhnian model was only a relatively recent explanation of what constituted normal science.

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<sup>100</sup> Ibid 62. As will be seen in Chapter 3, these four characteristics are readily apparent in the way juristic models are internalised by students.

Kuhn acknowledged that the pursuit of this normal science might inhibit some doubt and originality from the work of the typical practitioner, but that this freed them up to dispense with questions of definition and philosophical assumptions and allowed them to focus on puzzle solving. Later in the thesis, it will be asserted that this is precisely the environment in which many lawyers and judges prefer to work. They may accept that particular laws are tentative, but prefer to assume that the theoretical adversarial framework is inviolate. When a paradigm is truly entrenched, it is resistant to fads and transitory radical perspectives that could derail it.

As observed earlier, Kuhn holds that competing paradigms are incommensurable—meaning that we cannot comprehend a new paradigm by application of the terminology and the theoretical framework of the old paradigm, because in some sense, when paradigms change, the world changes with them. Understanding the nature and effect of incommensurability is critical to assessing the value of looking at the adversarialism/therapeutic jurisprudence divide in the context of Kuhnian paradigms. Determining whether each may be part of some juristic paradigm is necessary. However, the implication of most effect, if they *are* competing paradigms (or if each is part of a larger competing paradigm), is that they cannot then be compared according to some terms of common measure or analysis. They can still be compared, but not by using each other's method.

That is not to say that a discipline would come to an insurmountable barrier and suffer developmental paralysis because advocates of different approaches suddenly realise that they have no basis for common communication and do not understand each other. It does not imply that real progress can only be made once advocates of competing paradigms learn each other's core methods and values. That is so, claims Kuhn, because they generally do not even realise that they are talking at cross-purposes. They believe that they are just in 'straightforward disagreement,

that they understand each other's position well enough, and that they can see just what is wrong with it'.<sup>101</sup> Kuhn observes that:

[the] most fundamental aspect of the incommensurability of competing paradigms is that there is a sense in which the proponents of competing paradigms practice their trades in different worlds. One contains bodies that fall slowly, the other pendulums that repeat their motions again and again. In one, solutions<sup>102</sup> are compounds, in the other mixtures. One is embedded in a flat, the other in a curved, matrix of space. Practicing in two different worlds, the two groups of scientists see different things when they look from the same point in the same direction ... That is not to say they see anything they please. Both are looking at the world and what they look at has not changed. But in some areas they see different things and they see them in different relations one to the other.<sup>103</sup> That is why a law that cannot even be demonstrated to one group of scientists may occasionally seem intuitively obvious to another. Equally it is why, before they can hope to communicate fully, one group or the other must experience the conversion that we have been calling a paradigm shift.<sup>104</sup>

Chapter 6 of the thesis considers in detail whether adversarialism and therapeutic jurisprudence are in fact incommensurable, but it is worth flagging here that the property of incommensurability might well be a conceptual hurdle for those who advocate for a change to therapeutic (or any version of a post-adversarial) paradigm. Therapeutic jurisprudence scholars and practitioners, as we shall see, are typically very careful to claim that the promotion of therapeutic outcomes and processes should never trump or displace due process or legal rules. A naïve interpretation

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<sup>101</sup> Sharrock and Read, above n 25. This becomes evident in the current context when I examine the criticisms of some members of the judiciary in chapters 5 and 6, who seem to have a fairly limited understanding of the precise nature of for what the therapeutic jurisprudence is advocating.

<sup>102</sup> A solution in the chemical sense—ie, a homogeneous mixture composed of two or more substances, where one substance is dissolved in another.

<sup>103</sup> From a personal perspective, this phenomenon seems real to me when I attend therapeutic jurisprudence or non-adversarial justice conferences, at which the speakers and participants seem to share an intuitive and genuine belief in values that diverge from the mainstream adversarial ethos.

<sup>104</sup> SSR 158.

of paradigm theory and scholarship might well result in an incorrect conclusion that if therapeutic and adversarial paradigms are, in fact, incommensurable, then the values and principles of therapeutic wellness and due process are somehow unable to be balanced. I consider that addressing and refuting this concern and misapplication of Kuhn to be one of the most important outcomes of the thesis.

To paraphrase and apply Kuhn's position, advocates for competing juristic paradigms could not fully comprehend the other's perspective because they are observing elements of a literally different legal and social world. Kuhn would assert three supporting hypotheses for this conclusion:

1. Proponents of competing paradigms have different ideas about the importance of solving various legal problems, and about the standards that a solution should satisfy.
2. The vocabulary and problem-solving methods that the paradigms use can be different: the advocates of competing paradigms subscribe to a different conceptual network.
3. The advocates of different paradigms see the world in a different way because of their legal and academic training and prior experience as legal practitioners.<sup>105</sup>

This position is sometimes criticised as being radically relativistic, in that it would mean that we cannot make a rational choice between competing paradigms if there is no common descriptive or theoretical basis by which to compare them. In the 1969 postscript, Kuhn addresses this criticism. He points out that, regardless of the content of a disciplinary paradigm, practitioners within other fields, or intelligent readers or academics in general, ought to be able to recognise both the observable data that is claimed to underpin the principles of the paradigm and to assess its logical structure according to some meta-paradigm. In that sense, there is some

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<sup>105</sup> Ibid ch XII. It is particularly noticeable that the strongest advocates and most successful proponents of therapeutic jurisprudence seem to be those who have had, and who continue to have, significant experience in courts as judges and/or lawyers.

process or set of holistic benchmarks external to individual paradigms by which they can be validated or invalidated (at least in terms of their claims *to be a paradigm*) and we need not be limited to the claim that any particular paradigm is right according to some criteria unique to that paradigm, or wrong according to criteria unique to one of its rival paradigms.

Kuhn seems to have mellowed in his conception of incommensurability over time, though not the consequences of accepting the doctrine. In his later work, he has emphasised less the notion of some essential incommensurability between paradigm content and more the incommensurability of theories, terms, vocabularies and languages. He most recently referred to the concept of ‘untranslatability’ to explain the inevitable bind that advocates of competing paradigms are placed in.<sup>106</sup> He asserts that two theories would be incommensurable where there is no ‘language into which at least the empirical consequences of both can be translated without loss or change’.<sup>107</sup> There can never be such a neutral observation language because:

In the transition from theory to the next, words change their meanings or conditions of applicability in subtle ways. Though most of the same signs are used before and after a revolution—e.g. force, mass, element, compound, cell—the ways in which some of them attach to nature has somehow changed.<sup>108</sup>

Thus, even if we were to go so far as to say that adversarialism and therapeutic jurisprudence have different and incompatible languages and theoretical frameworks (that is, that they incommensurable), assessments can still be made by people outside of either paradigm about their relative

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<sup>106</sup> Kuhn develops this line of thought in Thomas Kuhn, *Proceedings of the 1982 Biennial Meeting of the Philosophy of Science Association* (1983) 712–16. Also in Thomas Kuhn, ‘Dubbing and Redubbing: the Vulnerability of Rigid Designation in Scientific Theories’ (1990) 14 *Minnesota Studies in Philosophy of Science* 298–318.

<sup>107</sup> SSR 266.

<sup>108</sup> Thomas Kuhn, ‘Reflections on My Critics’ in Imre Lakatos and Andrew Musgrave (eds), *Criticism and the Growth of Knowledge* (1970) 270.

strengths. This seems to be a reasonable position if we accept the nature of the relationship between a disciplinary paradigm and a wider worldview. That is the position that seems to have gained general, although not total, acceptance in the post-Kuhnian literature. Meynell explains it in this way:

To *understand* a paradigm which is a rival to the one held by oneself is to apprehend how it accounts for a *certain amount* of observable evidence. Not to *accept* a paradigm, which one understands, is to believe that there is *other* evidence which tells against it, that is, this evidence supports some other paradigm, and that this other paradigm explains at least a high proportion of the observable evidence explained by the first.<sup>109</sup>

If we accept this analysis, it is not possible for practitioners within each competing paradigm to engage in a true comparative discourse, because the principles they have learned have been acquired by the use of (and exposure to) exemplars rather than by the use of suitably analytical definitions. This gap cannot be closed by use of some common or neutral language, although each ought to be able to at least realise that the other has the status of a paradigm. That is not to say that debate or discussion between advocates is useless or a *non sequitor* (they can, of course, indirectly compare the relative merits of the relevant paradigms via the sort of meta-paradigm mooted by Kuhn above), but it does mean that a shift between paradigms will not occur as a result of the *disciplinary* content of such debate.

## 2.6 Alternatives to Kuhn—Continued Relevance

Although for the purposes of the social sciences and other disciplines (such as law and jurisprudence) that are apart from the natural sciences, the concepts of the paradigm, paradigm shift and incommensurability are obviously of great benefit in understanding how the disciplines change and evolve, the more technical aspects of the debate between Kuhn and later philosophers of science such as Popper, Lakatos and Feyerabend are of less benefit.

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<sup>109</sup> Hugo Meynell, 'Science, the Truth and Thomas Kuhn' (1975) 84(333) *Mind* 79, 85.



This chapter does not, for that reason, make any detailed assessment or application of the relative merits, for example, of the debate between Kuhn and his critics on the relative values of the concepts of verification and falsifiability in either proving or disproving theories.<sup>110</sup> However, it is necessary to briefly examine why Kuhn's model of disciplinary change is still relevant and valid in the face of some of its major critics. It would be somewhat pointless to propose or examine a Kuhnian model of change within law if the Kuhnian model did not continue to attract support among theorists or to resonate for practitioners.

We can assert, at least, that disciplines such as law are based on theoretical frameworks informed by a range of observable phenomena, policies, practices and principles—and it seems counterintuitive to argue about whether a single anomalous result or observation in the practice of law or the running of a court program invalidates that theoretical framework. A non-falsifiable theory or hypothesis (in the sense meant by Popper) can usually be expressed as a simple statement, such as: 'there exists an offender who completed a drug court program but then re-offended'. It is a simple matter to *verify* whether or not this statement is true by producing the recidivist offender. However, since this statement does not specify who the alleged recidivist is or in which court the program took place, it is not possible to prove that the recidivist does not exist. In other words, it is impossible to *falsify* the statement.

However, just because that statement cannot be falsified does not mean that it is necessarily true. Of course, it would be extraordinary if there was not some person for whom a drug court program did not 'work'. The point is that law is not a natural science and within the discipline we do not really make claims and devise theories based on hypotheses that can be easily tested by simple observations. To that extent, Popper's criticism that a theory can be rejected in the presence of one simple counter-example is

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<sup>110</sup> Popper suggested that a theory can never be fully verified, but only falsified.

of even less relevance to the agenda of the social sciences and humanities.

According to Popper, a theory is only of legitimate use to a discipline if it is falsifiable, and should be rejected as soon as it is falsified. A theory is falsified if even one single and reproducible contrary experience or result is detected. It is arguable that this criticism is too narrow to fit even the concept of a theory in the natural sciences and that it conflates a theory with a hypothesis. If we hypothesised that no mainstream court has ever applied a principle derived from the therapeutic jurisprudence movement, for example, then that hypothesis could be falsified if we observed a court that did this. However, if we were to reject the theory that the adversarial sentence hearing is the best method of achieving the objectives for imposing a sentence, on the basis of observing one successful drug court, that would seem highly premature.<sup>111</sup>

Kuhn conceives of the paradigm as existing within a disciplinary matrix, meaning the set or theoretical principles, values, methods and techniques that the members of a discipline collectively commit to. Unless a practitioner commits to the current disciplinary matrix, they cannot work within the existing paradigm. This conservative thread to Kuhnian theory is what fundamentally separates him from Popper and some latter theorists who claim that an important quality in any scientist/practitioner is a desire

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<sup>111</sup> A number of commentators have observed that if Popper's position about falsification was correct, then both Einstein's and Darwin's major theoretical contributions to their disciplines would have been rejected at an early stage. Neither the theory of evolution or of general relativity produced verifiable empirical evidence until many years after they were formulated. Further, there also seems to be a simple logical fallacy involved in Popper's falsification principle, regardless of whether we conclude that he conflates theory with hypothesis. A hypothesis or theory that states, for example, that 'for every metal, there is a temperature at which it will melt' does not seem to be necessarily capable of falsification. There must always be a higher temperature than the one used in any test, at which temperature the metal might actually melt. Whether we had the means to generate that temperature would be irrelevant for the purposes of the falsification principle.

to continually attempt to disprove their core positions (by looking for falsifying examples).<sup>112</sup>

Popper would hold that just a single anomaly (provided that it can be reproduced) is enough of a basis to reject any theory/paradigm. Kuhn would claim that during periods of normal science, practitioners do not make attempts to prove or disprove paradigms/theories. Anomalies are either explained away or ignored until that critical point at which too many have arisen (as illustrated by the way in which anomalies within the Ptolemaic system were dealt with). For many years, for example, the Family Court of Australia operated primarily according to orthodox adversarial principles despite the fact that this caused well-recognised anti-therapeutic effects for litigants. These were either ignored or explained away as the price we pay for objective justice.<sup>113</sup>

Popper's conception of the processes of change in the theoretical framework of a discipline does seem excessively positivist and pragmatic, and for this reason the Kuhnian position has prevailed among the majority of theorists in both the sciences and the social sciences. According to Popper, a paradigm change would be compelled by a single reproducible anomaly, but Kuhn asserts that there is no real or identifiable decision to change to a new paradigm and during a revolutionary phase there may be a number of new competing paradigms to choose from. Later analysis of the Kuhnian paradigm shift has strongly supported the view that the adoption of new disciplinary matrices are heavily influenced by socio-political factors. In the legal sphere, a decision to fundamentally change the style of mainstream judging to anything but an adversarial process would need to be political and to have widespread community approval.

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<sup>112</sup> This is not to suggest that Kuhn believed that those committed to a certain paradigm simply ignore counter examples or pretend that anomalous data do not exist. His point was that during a period of normal science, anomalies are unlikely to be seen as striking at the core of the paradigm until enough anomalies create a tipping point; a tipping point that sufficient members of the discipline recognise as such.

<sup>113</sup> Bryant and Faulks, above n 53.

It is also worth noting that Popper has a wider normative agenda than Kuhn and would accuse Kuhn of taking an authoritarian view of academic progress that mandates some sort of blueprint for change. He sees a practitioner's receptiveness to criticism and then to possible change rather as a personal ethic or civic duty.<sup>114</sup> In his first major work, Popper claims that progress in a discipline is just one element of a wider process or program of social and political change in which we search for an ideal through a system of approximations by trial and error. Popper claims that the key problem with the Kuhnian concept of the paradigm shift is that a new paradigm subsumes the existing paradigm and, therefore, the assumption that the process of trial and error brings us close to the ideal regardless of the outcome of the trial; that is, that a new paradigm is necessarily progress.

Although it might be appealing to contextualise therapeutic jurisprudence reforms as being part of a wider social trend, this is not necessarily the case, and it could be argued that such reforms are contrary to some measureable social dynamics (such as the rise or at least maintenance of levels of public punitiveness towards issues of law and order and sentencing).<sup>115</sup> The extent to which contemporary academics (including legal researchers) apply Kuhnian concepts to such a wide range of disciplines mitigates against any need for a deeper study of the criticisms of Kuhn's work in relation to paradigms and paradigm shifts.<sup>116</sup> However, two other lines of general research are also worth a brief mention. Imre

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<sup>114</sup> See his emotively titled, first major work *The Open Society and Its Enemies* (1945).

<sup>115</sup> Recent research suggests that levels of public punitiveness in attitudes to sentencing are still high: Geraldine Mackenzie, Kate Warner, Nigel Stobbs et al, 'Sentencing and Public Confidence : Results from a National Australian Survey on Public Opinions Towards Sentencing' (2012) 45(1) *Australian and New Zealand Journal of Criminology* 45.

<sup>116</sup> Within some disciplines there are even calls to review the core methods and values of the field by an application of some hybrid Kuhn-Popper model of disciplinary change. See, eg, Albert Farrugia, 'Falsification or Paradigm Shift? Toward a Revision of the Common Sense of Transfusion' (2011) 51 *Transfusion* 216.

Lakatos, a student of Popper's, has made attempts to reconcile Kuhn's position with the requirements of falsification by claiming that it is the falsification of programs of research that progress a discipline, rather than simply the falsification of universal statements.<sup>117</sup>

Of perhaps more interest are the claims by Paul Feyerabend that there are no methodological rules that all practitioners use. He objected to the idea of any unique and prescriptive methodological rules on the grounds that this would act to limit what constituted research and stymie progress within a field. His concern with the notion of a paradigm was, therefore, that it prescribes certain methodology(s). He recommended that there ought to be tolerance within any discipline for a certain amount of theoretical and methodological anarchy, to encourage diverse and innovative research.

One of the criteria for evaluating scientific theories that Feyerabend attacks is the consistency criterion. He points out that to insist that new theories be consistent with old theories gives an unreasonable advantage to the older theory. He makes the logical point that being compatible with a defunct older theory does not increase the validity or truth of a new theory over an alternative covering the same content. That is, if one had to choose between two theories of equal explanatory power, to choose the one that is compatible with an older, falsified theory is to make an *aesthetic* rather than a rational choice. The familiarity of such a theory might also make it more appealing to practitioners, since they will not have to disregard as many cherished prejudices. Hence, that theory can be said to have an unfair advantage. Feyerabend observed (paraphrasing Kierkegaard) that:

For is it not possible that science as we know it today, or a 'search for the truth' in the style of traditional philosophy, will create a monster? Is it not possible that an objective approach that frowns upon personal connections between the entities

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<sup>117</sup> To some extent this resistance to therapeutic jurisprudence as a research program, rather than an engagement with, and refutation of, its basic premises seems to be manifest in the judicial critics of the drug court program in the US. See generally Imre Lakatos and Paul Feyerabend, *For and Against Method* (1999).

examined will harm people, turn them into miserable, unfriendly, self-righteous mechanisms without charm or humour? 'Is it not possible,' asks Kierkegaard, 'that my activity as an objective [or critico-rational] observer of nature will weaken my strength as a human being?' I suspect the answer to many of these questions is affirmative and I believe that a reform of the sciences that makes them more anarchic and more subjective (in Kierkegaard's sense) is urgently needed.<sup>118</sup>

It is not easy to respond to Feyerabend's concern that such an incremental succession of paradigms may lead to undesirable conservatism and, perhaps, to a degree of self-legitimation.<sup>119</sup> We can observe, though, that the legal system has seen very few (if any) paradigm changes and that if we were to reject the possibility of a shift from an adversarial to a therapeutic paradigm simply on the grounds that the therapeutic paradigm had an unfair advantage over other possible contenders (on the grounds it was to some extent reconcilable with such institutions as, say, the existing common law), then the other contending paradigms would almost certainly have no chance of success in any case.

## 2.7 Conclusion

The broader of Kuhn's two conceptions of the paradigm discussed in this chapter, which equates it with the entire constellation of beliefs, values and techniques shared by the members of discipline, is of little use in terms of analysing the relationship between adversarialism and therapeutic jurisprudence. As will be seen in Chapter 4, it would simply be wrong to conceive of our current legal system as being wholly referable to an adversarial ethos in this way. There are many processes and roles in the practice of law that are clearly not adversarial.

The narrower and more clearly thought out conception of the paradigm from the 1969 postscript is that which has fascinated a range of disciplines

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<sup>118</sup> Paul Feyerabend, *Against Method* (1975) 154.

<sup>119</sup> However, Kuhn could well share similar concerns. Kuhn was not concerned to defend the process of change in science but to explain it.

across the social sciences and humanities, and is what will concern us for the purposes of this thesis. The idea of a paradigm that stands as one sort of element in that constellation, comprising a set of concrete puzzle solutions that act as exemplars against which to assess principles and practices within the wider disciplinary matrix is the Kuhnian phenomenon that provides the most powerful mechanism for examining the relationship between two significant schools of thought in a professional and academic discipline.

Thus, the narrower of these two conceptions provides the sharpest focus for measuring the degree of incommensurability between purported paradigms and hence offers the best analytical tool for delineating the relationship between therapeutic jurisprudence and adversarialism. The next step in that process is to consider whether legal systems (juristic models) can be validly conceived of as entities that operate pursuant to a Kuhnian paradigm.

## **Chapter 3**

### **Juristic Models as Kuhnian Paradigms**

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#### **3.1 Introduction**

In Chapter 2, I undertook a brief analysis of the trend in which Kuhnian principles seem to have migrated from the hard sciences into the social sciences and humanities,<sup>1</sup> perhaps as part of the wider focus on social and political worldviews as contexts for change in the intellectual and academic trajectory from modernity to postmodernism. I will not consider in any detail possible postmodern criticisms of Kuhn. However, I note that the Kuhnian paradigm is not equivalent to the phenomenon of the modernist grand narrative of which postmodernism is so critical. Indeed, Kuhn would not claim that a paradigm is somehow a product of nature but is a product of the collective will of those who propose and practice it. He argued that new paradigms are no more valid (in the sense that they are somehow truer representations of some natural order of things) than the

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<sup>1</sup> 'Law' is most often situated within the humanities, given its concern with analytical statements and research (the so-called doctrinal method) rather than with social fact that informs the methods of the social sciences. For the purposes of this chapter, the distinction is moot.



older ones they replace—they are simply more useful and more widely accepted.

Kuhn was deeply suspicious of intellectual and scientific progress. He characterises scientists as a self-regulated guild that banishes and marginalises those who dissent, spends its time almost exclusively with the practical minutiae of disciplinary practice (puzzle solving) and ‘sometimes drastically distorts the discipline’s past’.<sup>2</sup> Thus, when discussing the history and structure of change in the legal system, which is an important theme in the thesis, I do not conceive of the task as analysing and explaining some grand narrative of law. However, in analysing the legal system in terms of Kuhnian paradigms, there is an obvious threshold question as to whether it is a system capable of such (Kuhnian) analysis.

In this chapter, therefore, I consider whether legal systems (which I will conceive of as the professional and practical manifestations of juristic models) can be validly conceived of as the sort of disciplinary matrices that Kuhn held operated pursuant to a paradigm. It is necessary to establish this first in order to then progress to the question of whether adversarialism and therapeutic jurisprudence comprise, or are situated within, different paradigms (in chapters 4 and 5) and what they are then paradigmatic of—and finally to investigate (in Chapter 6) whether they are, therefore, incommensurable.

Thus, I will not assert here that a juristic model *is* the paradigm that underpins the operation of a particular legal system, but that legal systems are informed by juristic models, which can be dependent upon a set of paradigmatic exemplars shared by practitioners who act in accordance

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<sup>2</sup> At SSR 167, he says that ‘a member of a scientific community is like the typical character of Orwell’s *1984*, the victim of a history written rewritten by the powers that be’. If there were to be any grand narrative of a discipline, according to Kuhn, then it would be written by those working pursuant to the current paradigm and hence written as a distorted description of ‘progress’.

with, and acceptance of, that model. If law as a discipline (in the Kuhnian sense) is a social science or humanity, then based on the discussion in Chapter 2, that should be possible.<sup>3</sup>

### 3.2 Disciplinary Maturity

Kuhn makes some interesting observations about the emergence of an initial (or foundational) paradigm in new disciplines, or professions, within science—as opposed to the initial paradigms that may have informed other fields. He says:

In the sciences (though not in fields like medicine, technology, and the law, of which the principal *raison d'être* is an external social need), the formation of specialised journals, the formation of specialists societies, and the claim for a special place in the curriculum have usually been associated with a group's first reception of a single paradigm.<sup>4</sup>

Once a paradigm is operant and accepted, practitioners within the relevant discipline no longer feel it necessary to attempt to start from first principles whenever they publish, offer definitions of the field or delineate it in their writings. That work is left for textbooks.<sup>5</sup> Practitioners start to write mainly for other professionals within the paradigm whose knowledge can be assumed. The original research becomes more inaccessible to the general reader. Kuhn expressly allowed, writing in the mid 1970s, that this inaccessibility is beginning to characterise some of the social sciences. Indeed, a practitioner within a field that operates according to an established paradigm is more likely to see his reputation tarnished by writing foundational works such as textbooks—the basic exemplars in the

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<sup>3</sup> 'Discipline' can refer to both the pure academic process or to the academic process and the relevant professional and social activities linked to it. For example, theoretical physics and applied physics are both parts of the discipline of physics according to Kuhn.

<sup>4</sup> SSR 19.

<sup>5</sup> Ibid 20. Here Kuhn argues that '[g]iven a textbook, the creative scientist can begin his research where it leaves off and thus concentrate exclusively upon the subtlest and most esoteric aspects ... that concern his group ... his work only expressed to professional colleagues ... whose knowledge of a shared paradigm can be assumed'.

field need no explanation or justification for those actually working within it.<sup>6</sup> Kuhn observes that once a field reaches the point where its practical functions and applications are happening smoothly, to the extent that a coherent core of received principles seems to be informing day-to-day work, then meta-analysis and theoretical reflection can take place:

Acquisition of a paradigm and of the more esoteric type of research it permits is a sign of maturity in the development of any given scientific field.<sup>7</sup>

If we grant then, that disciplines outside the hard sciences are capable of being conceived of as subject to Kuhnian paradigms (as was argued in Chapter 2), then it is necessary to establish whether within the rubric of the law there is something that can be coherently and analytically articulated as such a discipline. An obviously important consideration and challenge is to delineate with sufficient clarity what is meant by concepts such as the law, the legal system, the justice system and other general descriptions of those fields and institutions to which researchers and practitioners suggest that therapeutic jurisprudence principles might apply in a wider sense, as a precursor to considering whether we can conceive of these concepts as operating according to a discrete paradigm.<sup>8</sup> There is an element of vagueness about this in the literature that is perhaps reflective of the allegations of vagueness and indeterminacy that are sometimes levelled at the therapeutic jurisprudence movement itself.

In a paper that does conceive of therapeutic jurisprudence as a paradigm,<sup>9</sup> for example, Freiberg conceives of it as having relevance to entities variously described as ‘the wider judicial and correctional system’, ‘the

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<sup>6</sup> Ibid 20.

<sup>7</sup> Ibid 11.

<sup>8</sup> By the same token, there is a danger in trying to be too pedantic and exclusive in the definition process. The ambit of what is caught by terms such as ‘legal system’ or ‘justice system’ can expand and contract within a discourse without invalidating the application of Kuhnian concepts, so long as these ‘systems’ can be referable to a set of paradigmatic exemplars.

<sup>9</sup> Albeit in a perhaps less rigorous sense than is considered in the thesis.

criminal justice system', 'court practices', 'traditional institutions of criminal justice', 'court system', 'the courts', 'the larger court structure', 'broader judicial enterprise' and 'larger trial court systems'.<sup>10</sup> Without attempting much in the way of analysing the nature of a paradigm or what adversarialism is actually a paradigm of, Freiberg asserts (in the abstract to the paper) that:

recent changes to court practices manifested in drug courts, domestic violence courts, mental health courts and Koori courts can be generalised to the wider judicial and correctional system through an understanding of the key features of problem oriented courts and the theory of therapeutic jurisprudence. It argues further that therapeutic jurisprudence and restorative justice have in common a recognition of the importance of factors such as trust, procedural fairness, emotional intelligence and relational interaction which, if applied more broadly, can provide a constructive alternative to the flawed adversarial paradigm which presently dominates the criminal justice system.<sup>11</sup>

This sort of representation of the relationship between therapeutic jurisprudence and adversarialism is relatively common in the literature and perhaps understandably so.<sup>12</sup> It contains three assumptions that are explored in depth in chapters 4 to 6. They are:

1. that adversarialism constitutes a paradigm<sup>13</sup>

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<sup>10</sup> Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2003) 20(2) *Law in Context* 6–7, 18–20.

<sup>11</sup> Ibid 1 (this extract is the abstract to the paper). A few years later, Freiberg seemed to have broadened his scope somewhat by suggesting the emergence of a 'non-adversarial paradigm': Arie Freiberg, 'Non-adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205.

<sup>12</sup> See also Susan Daicoff, 'Growing Pains: The Integration Vs Specialisation Question for Therapeutic Jurisprudence and other Comprehensive Law Approaches' (2008) 30 *Jefferson Law Review* 551; Warren Brookbanks, 'Therapeutic Jurisprudence: Conceiving an Ethical Framework' (2001) *Journal of Law and Medicine* 328, 329; David Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1(1) *Psychology, Public Policy and Law* 220.

<sup>13</sup> Or at least operates pursuant to a paradigm. Now that this sort of distinction has been made, that is between something that 'is' a paradigm and something that operates pursuant to a paradigm, I will adopt the simpler analytical approach of using the two

2. that this adversarial paradigm is flawed
3. that therapeutic jurisprudence<sup>14</sup> is an alternative (and arguably superior) paradigm.

Chapters 5 and 6 consider the implications of conceiving of therapeutic jurisprudence as being part of a discrete therapeutic paradigm (rather than itself comprising one) and posits whether this therapeutic paradigm is incommensurable with the adversarial paradigm. Whether it is, or is part of, a superior paradigm is not a focus here.

It is important to keep in mind that to conceive of something as a paradigm does not entail an assertion that it is somehow a complete system of theory or practice. A shift in paradigm, as was discussed in the previous chapter, entails a shift in the core focus and values of a discipline that generates new exemplars for testing new theories and practices within a discipline. Much of what is done in the replaced paradigm may be retained within the changed disciplinary matrix. It is important to note this in order to avoid the concerns, made by some therapeutic jurisprudence scholars and critics, that therapeutic jurisprudence is not some sort of cult, panacea, substitute for rigorous analysis of facts and law or an end in itself.<sup>15</sup> Even if we were to accept the strong position contained within statement (3) above, this would not entail that therapeutic jurisprudence provides the theoretical or normative basis for everything carried out within the rubric of the law.

A shift in paradigm could even be characterised as simple and broad a process as the law being fundamentally concerned with refereeing a dispute between parties to decide a winner based on accepted procedural

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concepts interchangeably from here on. For the purposes of this part of the thesis at least, very little hangs on the distinction.

<sup>14</sup> Freiberg does obviously conceive of therapeutic jurisprudence in this statement as part of a wider and more holistic approach to 'law', and this issue is dealt with in more detail in Chapter 5.

<sup>15</sup> Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risk of Influence' (2008) 30 *Jefferson Law Review* 575, 576.

rules, to being fundamentally concerned with seeing itself as a social force potentially enhancing or inhibiting therapeutic outcomes. To accept the latter as a fundamental focus would not entail losing all the adversarial qualities of the former, but it would (at least) entail that a therapeutic filter might be applied to all legal processes *a priori*.<sup>16</sup> This filter would, however, contain some paradigmatic exemplars that would require compliance. We could propose, for example, that where there is a choice between two ways of conducting a witness examination, where both comply with rules of due process and substantive law, but where one will produce demonstrably less anti-therapeutic effects for the witness, then that latter form of examination ought to be conducted.<sup>17</sup> It is virtually *de rigueur* in contemporary therapeutic jurisprudence scholarship to note that what was once an approach to the reform of mental health law and practice has broadened into many other areas of law and to list a whole host of those areas. However, the focus of therapeutic jurisprudence on the emotional and psychological well-being of those involved in the legal system, in ways such as this, is a logical consequence of that early focus.

In an early paper on the scope of therapeutic jurisprudence, Wexler asked:

Once one starts approaching legal areas with the use of the therapeutic jurisprudence lens, who can tell what one will find? If certain legal arrangements or procedures seem to lead to high stress, anger, feuding behaviour, even violence between different parties, neighbours, riparian land owners and so forth, those arrangements and procedures may indeed become ripe for therapeutic jurisprudence inquiry.<sup>18</sup>

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<sup>16</sup> Wexler allows that therapeutic jurisprudence is not new in that it provides a therapeutic lens with which to examine existing and proposed laws, procedures and roles. However, what does seem to be new, he claims, is that it 'brings together and situates under one conceptual umbrella areas that previously seemed disparate, many of which were developed in isolation ... therapeutic jurisprudence itself provides a lens and a new scope of scholarly inquiry': David Wexler, 'Putting Mental Health into Mental Health Law' (1992) 16(1) *Law and Human Behaviour* 236.

<sup>17</sup> Something like this sort of evolution has occurred in relation to especially vulnerable witnesses such as children and victims of sexual abuse.

<sup>18</sup> David Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1(1) *Psychology, Public Policy and Law* 220, 228.

### 3.3 Conservatism and Pragmatism in Juristic Models

In the subsequent 17 years since the publication of this paper by Wexler, there has indeed been a very significant spread of therapeutic jurisprudence principles and practices into both specialist and mainstream courts and legal practices. However, Wexler went farther and noted that until that time the bulk of therapeutic jurisprudence scholarship had been micro-analytical rather than macro-analytical. He saw it as a problem that so much therapeutic jurisprudence writing and research is 'centrist' in that it seeks to reform the law rule by rule and procedure by procedure, rather than to take the transformative approach championed by the so-called 'outsider' movements in jurisprudence such as critical legal studies, critical race theory and feminist jurisprudence. He sees it as a potential weakness that much social science research and scholarship limits itself to micro-level recommendations and criticisms of the legal system. He notes that there was certainly no intention to construct a 'Therapeutic State', but argued that a macro-analytic therapeutic jurisprudence was needed (and was emerging).<sup>19</sup>

This issue of whether therapeutic jurisprudence can be conceived of as more than a micro-analytical process or filter depends on (to some extent at least) whether it can be characterised as a paradigm in the Kuhnian

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<sup>19</sup> According to Wexler, micro-analytical therapeutic jurisprudence is not limited to work on an individual case, client or problem. He asserts that it is more akin to a law reform process in which the practitioner or researcher attempts to affect all future similar issues or instances of the rule or procedure. In an earlier paper—David Wexler, 'Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship' (1993) 11 *Behavioural Sciences and the Law* 17—Wexler had argued that therapeutic jurisprudence reflects changing conceptions of the law and legal scholarship and also made some comments about the relationship between therapeutic jurisprudence, the social sciences and the discipline of law. His view was that therapeutic jurisprudence does raise questions that produce answers that are both empirical and normative, but the proper task of the legal scholar is not to generate data but to use data in framing recommendations and then to perhaps (at 19) 'suggest important and relevant lines of inquiry to social scientists'.

sense. At the very least, a Kuhnian analysis assists in providing some possible criteria for the validity of broader application. By conceiving of both adversarialism, and a purported therapeutic alternative, as operating according to a paradigm-based juristic model, we can be more precise than other contributors to the literature whose work is hampered, to some extent, by an unclear picture of what theoretical perspectives and assumptions would need to change in order for therapeutic jurisprudence to obtain significant mainstream influence and credibility.<sup>20</sup>

A juristic model would include a theoretical framework, and disciplinary matrix, on which the processes of civil and criminal litigation in courts are based. Those processes (which I suggest sprout from common theoretical and procedural roots) include at least legal and judicial reasoning, legal and judicial methodology, legal and judicial interpersonal rules and techniques, criminal and civil procedure, legal and judicial ethics and legal epistemology. This list is not meant to be exhaustive nor is any item within it necessary. The juristic model would include what Kuhn referred to as the disciplinary matrix and the rationales and theories that inform and regulate it. The relevant paradigm at the heart of the juristic model would consist of the relevant set of exemplars.

If we accept, for the sake of the analysis contained in this thesis, that we have a legal system that is informed by a paradigm (and most would agree that if so, then this is an adversarial paradigm), then we accept that there is something that that paradigm is 'paradigmatic of'. This may sound somewhat tautological, but it simply highlights that there is no real need to precisely or exhaustively describe what either a legal system or a juristic model are. The legal system is something that can be (and very frequently is) referred to in professional and academic discussions and analyses between practitioners within the discipline(s) of law. It is a useful holistic

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<sup>20</sup> This is not to suggest that a fully worked theoretical framework for the paradigm needs to be articulated in order to 'sell' the paradigm, but that a generation of jurists who are immersed in the paradigm would need to develop and flesh out such a framework if it was to survive.



descriptor. Juristic model is simply a more analytical term, adopted in this chapter, for reasons that are discussed below.<sup>21</sup>

As has been previously noted, law is an inherently pragmatic and conservative discipline. In explaining why it is that the adversarial system is in fact paradigmatic, I rely to some extent on that observation to ground the assertion that jurists value certainty.<sup>22</sup> However, we ought not to over-emphasise this conservatism to the extent of labelling jurisprudence or the study of law as an attempted exercise in simple empiricism, as some commentators do. Some social science theorists take the view that there is a profound difference between what they conceive of as legal thinking and thinking within their own disciplines, based on the perception that legal thinkers take the law as a given. Campbell, for instance, has this to say about legal thought by way of comparison to what he calls 'sociological thought':

Lawyers habitually operate within the framework of the legal system and adopt for their own standpoint the interpretations of reality contained in the law. This may be done consciously or unconsciously ... sometimes with good justification and sometimes without. Allied to this assumption of 'the law as there' are a whole host of other assumptions as to the functions and utility of law as a practical instrument for social control. They impart to legal thought a practical and pragmatic flavour. Taking as given, the legitimacy of established norms and procedures, and accepting their purpose to be that of defining and controlling human behaviour, legal thought virtually constitutes an official version of knowledge. That this is not the case with sociological thought is a point that requires no elaboration.<sup>23</sup>

Campbell claims that this acceptance of law 'as a given' rests on a 'massive assumption' that the contents of laws are in some sense descriptions of the actual world. The importance of worldviews (or more precisely, *Weltanschauung*) to any purported paradigm was discussed

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<sup>21</sup> One important reason for the use of the term 'juristic model' is to catch within one phrase both academic and practicing lawyers, that is, jurists.

<sup>22</sup> See the discussion below about Thomas Hobbes in relation to certainty in the law.

<sup>23</sup> Colin Campbell, 'Legal Thought and Juristic Values' (1974) 1(1) *British Journal of Law and Society* 13.

previously, but to suggest that legal theorists or practitioners necessarily conflate pragmatic conservatism with knowledge claims is spurious. It may seem to those outside the law that jurists look upon the law (in the sense of a body of rules) as empirical facts, but the reality is that much of what a lawyer does requires us to adopt that appearance.

It would be a rare opportunity for an advocate to suggest to a court that a particular law is invalid or inconsistent with other laws, but such a situation is possible. It is not that uncommon for legislation to be challenged on the basis of its constitutional validity, or for a common law rule to be challenged and overturned by a later appellate court. The circumstances in which such challenges *succeed* are relatively uncommon, which is why they usually attract much attention, but that is a very different thing to seeing laws as descriptive of the actual world.<sup>24</sup> Laws are contingent upon the intention of their source. Parliament, for example, can choose whether or not to give some declaratory statement the quality of law and can, in most instances, remove that quality at whim. To claim that it is a fact that the law about a given matter is such and such is quite different to claiming that this is some particular 'interpretation of reality'.

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<sup>24</sup> It could be that writing in the late 1970s, Campbell was influenced by the emergence of contemporary natural law jurisprudence, as characterised by the work of jurists such as John Finnis and Ronald Dworkin. The natural law position is a neo-Kantian view that positive law (ie, that which is posited or written down) is not sufficient to qualify as law. Rather, according to the natural law theorists, it must also accord with some naturally occurring normative phenomena such as 'justice' or 'morality'. It is hardly a settled matter in jurisprudence, or in the wider discipline of ethics for that matter, that these sorts of phenomena are part of the 'natural world' at all. See Ronald Dworkin, *Taking Rights Seriously* (1978); John Finnis, *Natural Law and Natural Rights* (1980); John Finnis, 'On "Positivism" and "Legal Rational Authority"' (1985) 5 *Oxford Journal of Legal Studies* 74–90; Finnis 1991, II, 167–83.

Therapeutic jurisprudence is often described as an interdisciplinary attempt (pioneered by Wexler<sup>25</sup> and Winick) to convince the legal profession that law is a social phenomenon that inevitably and significantly influences the health of many of those who come into contact with it, and that we should strive to reform our legal institutions, rules and roles to ensure that this influence creates as little harm as possible.<sup>26</sup> The concept of a juristic model that is proposed here is meant to be broad enough to capture at least the potential objects for reform that Wexler and Winick identify, but also those elements of the law and legal practice over which adversarialism has significant control.

One of the reasons that it is difficult to establish which institutions, processes and rules are caught within the ambit of the adversarial system (as discussed further in the next chapter) is that there is such a strong and necessary streak of pragmatism in the law. Law was a system of resolving disputes long before it became an academic discipline and did not develop from a coherent and well-articulated body of theoretical principle.<sup>27</sup> However, because of that inherent pragmatism, it is probably not surprising that of all the social sciences and humanities, law should be prominent among the disciplines that seek to see themselves governed by such a predominantly scientific phenomenon as the conceptual paradigm. At various stages, lawyers, political theorists and legal academics have sought to equate law with the natural sciences.

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<sup>25</sup> Wexler was the first to coin the phrase in a paper he presented to a National Institute of Medical Health workshop in 1987 (that paper then became the introduction to his book *Therapeutic jurisprudence: The Law as a Therapeutic Agent* (1990).

<sup>26</sup> David Wexler and Bruce Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) 17.

<sup>27</sup> I acknowledge the influence of some early philosophers (such as Plato and even the pre-Socratics) and of some theologians (such as St Thomas Aquinas) on jurisprudence as discussed in Chapter 4, but this sort of influence on 'the law' was ad hoc and often written in relation to existing law.

John Stuart Mill, for example, asserted that there was such a thing as a 'naturalistic' social science and that there were causal laws that shaped human society and social interactions just as there are causal laws that seem to define the physical or natural world.<sup>28</sup> Some critics suggest that there is such a strong tendency for lawyers and legal philosophers to see the law as a given in that it assumes the mantle of a worldview itself rather than as reflective of some broader worldview (as was suggested in relation to the liberal *Weltanschauung* in the previous chapter). Campbell reiterates his earlier view of the perceived relationship between the law and wider reality in this way:

Legal thought seems possessed of characteristics and peculiarities in its mode of comprehending reality that distinguish it radically ... Essentially, in my view, this stems from an acceptance of *law as given*, which results in most subsequent thinking resting on the massive assumption that the prescriptions contained in law and laws are in some sense descriptions of the actual world. Lawyers habitually operate within the framework of the legal system and adopt for their own standpoint the interpretations of reality contained in the law.<sup>29</sup>

However, the depth of this view of the law as a given is not necessarily all that great. Conceiving of the law as some sort of *a priori* truth is perhaps a better illustration of law's pragmatism than evidence of the worldview of the jurist. The tendency of some jurists to conceive of the law as being a form of objective logic has long been recognised as more of a mask for more human characteristics. According to early legal realist Oliver Wendell Holmes:

The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic ... But certainty generally is illusion ... Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But

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<sup>28</sup> John Stuart Mill, *A System of Logic* (2002).

<sup>29</sup> Campbell, above n 23. See also Colin Campbell, 'The Path of the Law' (1897) 10 *Harvard Law Review* 450, 457.

why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.

As we shall see in the next section of this chapter, however, this influence of subjective and contextual factors on ‘the very root and nerve of the whole proceeding’ is what makes the law such an important candidate for Kuhnian analysis.

### **3.4 Extending the Paradigm Concept to the Social Sciences and Humanities**

The legitimacy of extending the paradigm concept to the social sciences and beyond can be observed in the long history of scholarship dedicated to that objective.<sup>30</sup> Handa, working in the field of the sociology of education, is usually credited with pioneering the development of the concept of the Kuhnian paradigm within the context of social sciences. He analogises the scientific paradigm with what he calls a ‘social paradigm’ and focuses on the social circumstances that precipitate a shift in social paradigms. The assertion here is that there is, therefore, precedent for attempting to conceive of a Kuhnian paradigm as being relevant to disciplines outside of science.

There has always been a desire among social scientists to define their disciplines as mature sciences in some sort of revolutionary/paradigm-shifting phase/crisis rather than as pre-scientific ideologies.<sup>31</sup> One asserted problem with ideologies, as argued by Hutcheon, is that by ‘rendering their proponents politically powerful but rationally and

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<sup>30</sup> ML Handa, ‘Peace Paradigm: Transcending Liberal and Marxian Paradigms’ (Paper presented at the International Symposium on Science, Technology and Development, New Delhi, India, 20–25 March 1986).

<sup>31</sup> As both Popper and the early Kuhn agreed they were.

instrumentally impotent, they can throw up insurmountable barriers<sup>32</sup> to reasoned and value-guided change within a discipline. Because ideologies claim to represent truth, their methods, models and communities focus on the transmission and interpretation of unchallenged doctrine rather than rational, hypothesis-testing and organic progress. Kuhn held that science does not seek true theories converging towards an ultimate picture of reality.

As discussed in the previous section, the adversarial paradigm is closely (perhaps symbiotically) integrated with traditional liberal ideology and its strong focus on individual rights and due process. The implication is, in much of the literature critical of therapeutic jurisprudence, that in opposing the primacy of adversarialism, therapeutic jurisprudence advocates are thereby taking an anti-liberal stance against individual rights and due process.<sup>33</sup> The nature of this criticism is critically important, as it may well be the relative emphasis placed on the importance of due process, procedural fairness or natural justice that forms a deep enough schism between the two asserted models of juristic thought (that is, adversarialism and therapeutic jurisprudence) to define them as paradigmatic competitors. This illustrates just what it is that is incommensurable between the two. The existence of contrary exemplars are, of course, necessary for paradigm shift.

In the adversarial system, integrity of procedure is what guarantees justice, and this is largely achieved by allowing the adversarial litigants to define the dispute and the resources used to decide a winner. Within a purported therapeutic paradigm (such as that mooted earlier by Freiberg),

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<sup>32</sup> Pat Hutcheon, 'Popper and Kuhn on the Evolution of Science' 4(2) *Brock Review* (1995) 28, 37.

<sup>33</sup> The nature and scope of this criticism is closely examined in Chapter 6, but see, eg, Eric Cohen, 'The Drug Court Revolution: Do We Want Theory Rather Than Justice to Become the Basis of Our Legal System?', *The Weekly Standard*, 27 December 1999, 20; Morris B Hoffman, 'The Drug Court Scandal' (2000) June *North Carolina Law Review*, 1477, 1529.

the court and judge are required to be much more interventionist and to modify and customise procedure according to the opportunities that arise to address the real substance at the heart of disputes or of offending behaviour.<sup>34</sup>

In an adversarial court, the scope for a judicial officer to seize upon an opportunity to address issues wider or more fundamental than those dictated by the black letter law, the strategic decisions of litigants and lawyers and by rules of evidence and procedure is mostly quite limited. In a therapeutic court, judicial officers may well be required to actively seek out and act on such opportunities. The very fact that this would seem anathema to some liberalist-minded critics suggests that they, as well as many therapeutic jurisprudence practitioners and advocates, see the differences as paradigmatic in the Kuhnian sense. An illustrative view is that of Kates who, in an article provocatively entitled 'Why Therapeutic Jurisprudence Must Be—and Will Be—Eliminated From Our Family Courts', asserts that:

One of the problems with the rise of therapeutic jurisprudence ... has been the subtle denigration of long-established precepts of lawyer independence and due process ... The introduction of subtle and often unrecognized conflicts of interest afflicting lawyers' representations of their clients, created through the common development of multidisciplinary collegial relationships ... arise because most lawyers represent different kinds of clients on ideologically oppositional sides in different cases.<sup>35</sup>

As for the contemporary social scientists, the motivation for lawyers wanting to perceive the law, or a juristic model, as akin to some natural phenomenon is explainable by what certainty offers, promises and obtains. Certainty of definition, of interpretation and of application are traditionally the cornerstones of good law-making and of good judging. They are a

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<sup>34</sup> Freiberg discusses many of the purported differences and defining values of what he refers to as 'a broader narrative for law and justice' in Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205, 221.

<sup>35</sup> Elizabeth Kates, 'Why Therapeutic Jurisprudence Must be Eliminated from Our Family Courts' (2008) 13 *Domestic Violence Report* 65.

bulwark against perceptions and accusations of arbitrariness and subjective bias. A classic statement of this need for certainty among jurists comes from Hale's criticism of Thomas Hobbes' position on the common law:

It is one of the thinges of greatest moment in the profession of the Com[m]on Law to keepe as neare as may be to the Certainty of the Law and the Conson-ance of it to it Selfe, that one age and one Tribunall may Speake the Same thinges and Carry on the Same thred of the Law in one Uniforme Rule as neare as is possible; for otherwise that w[hi]ch all places and ages have Contended for in Laws[,] namely Certainty and to avoid Arbitrariness and that Extravag-ance that would fall out, if the reasons of Judges and advocates were not kept in their traces[,] wold in halfe an age be lost.<sup>36</sup>

As will be discussed in Chapter 4, this concern that all legal tribunals ought to '[s]peake the Same thinges and Carry on the Same thred of the Law in one Uniforme Rule as neare as is possible' has given rise, within the adversarial worldview, to assumptions that due process, procedural fairness and natural justice require strong homogeneity in the way courts and judges treat those appearing before them. The argument that precedent and due process can be consistent with a much more intimate focus on individual needs by judges, pursuant to a therapeutic paradigm, is dealt with in Chapter 5.

### **3.5 Determinism, Empiricism and Juristic Models**

It is far from clear that to qualify as a paradigm in the Kuhnian sense that a candidate set of exemplars must be linked to a purely empirical discipline in any case, as was argued in Chapter 2.<sup>37</sup> This is partly because the rigid

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<sup>36</sup> Matthew Hale, 'Criticisms on Hobbes's Dialogue of the Common Laws' in WS Holdsworth (ed), *A History Of English Law* (2<sup>nd</sup> ed, 1937) 506.

<sup>37</sup> By empirical I mean either the sense in which a discipline is based on data gleaned from observations, experience or experiment, or the sense in which an empirical discipline or method is differentiated from one that makes use of deduction from first principles (such as analytical philosophy). We could conceive of both the natural sciences



and deterministic view of the natural sciences has been considerably eroded over the past 100 years or so. At least, the strong brand of determinism evinced by the position that every event, including human cognition, behaviour, decision and action, is causally determined by an unbroken chain of prior occurrences.<sup>38</sup>

A determinist worldview is one in which the physical world (at least) is fundamentally shaped and regulated by causal laws and relationships that can be observed and measured, which in turn leads to empirical certainty. This fundamentalist worldview has been largely abandoned in the natural sciences, most notably in physics<sup>39</sup> and biology.<sup>40</sup> To some extent, it was Kuhn who identified and gave a broader theoretical justification for the trend away from a deterministic worldview in science by denying that observation, experience and experiment serve as neutral arbiters between competing theories. In arguing that paradigms are largely an expression of a consensus among practitioners, based on factors other than empirical certainty, the idea that there are scientific methods that are theory-neutral has largely been discredited.

Law is also a fundamentally normative enterprise and any attempt to say what the law is, or what it ought to be, is going to be in large part a normative rather than empirical undertaking. This is a familiar theme in jurisprudence. Interestingly, the founders of therapeutic jurisprudence seem to be sensitive and somewhat tentative as to the role of empirical method in a therapeutic jurisprudence paradigm. Wexler cautions that those who examine existing therapeutic jurisprudence research ought to

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and the social sciences as being based on observation and testing—and therefore, empirical disciplines.

<sup>38</sup> Peter Van Inwagen, *An Essay on Free Will* (1983).

<sup>39</sup> John Earman, 'Aspects of Determinism in Modern Physics' in J. Butterfield and J. Earman (eds) *Philosophy of Physics, Part B* (2007) 1369–434; George Ellis, 'Physics and the Real World' (2005) *Physics Today*.

<sup>40</sup> Edward Lewis and Russell MacGregor, 'On Indeterminism, Chaos, and Small Number Particle Systems in the Brain' (2006) 5 *Journal of Integrative Neuroscience* 223–47.

accept that it is a hypothesis-generating activity, but that the overall therapeutic jurisprudence project should not 'stand or fall on the reader's assessment of the empirical accuracy of particular illustrations'.<sup>41</sup> He warns against legal scholars attempting to water down or 'censor' their method under some prior notion of what empirical methods may allow or to resolve perceived methodological difficulty by erring on the side of conservatism. He suggests that therapeutic jurisprudence scholars ask the questions that need to be asked and that then:

social scientists and ethicists should be given the opportunity of thinking through the propriety of conducting the research ... [I]ndeed, policy recommendations may often be permissibly made on the basis of empirical questions that lead suggestions but that lack definitive empirical answers.<sup>42</sup>

There is clearly an important question to address in terms of whether understanding law (or any social practice or normative system for that matter) must necessarily collapse into making judgments about the value of the ways in which the law currently operates. If we were to grant, however, that we cannot make a full and adequate description of the law without taking a position as to its worth and value, then that ought not to preclude us from asserting that the law can be conceived of as conforming to one paradigm or another. Indeed, we could well interpret Kuhn as taking the view that these value judgments about opposing paradigms is what ultimately causes them to shift (as opposed to Popper's view that it is empirical falsification rather than the mind-set of the practitioners in a discipline that leads to significant theoretical shifts).<sup>43</sup>

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<sup>41</sup> David Wexler, 'Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship' (1993) 11 *Behavioural Sciences and the Law* 17, 21.

<sup>42</sup> In support of this assertion, Wexler claims support from John Monahan and Laurens Walker, 'Empirical Questions Without Empirical Answers' (1991) *Wisconsin Law Review* 569.

<sup>43</sup> This is not to say that legal theorists have decided one way or the other on this fundamental issue. HLA Hart, for example, claimed that observers and researchers can articulate laws and develop an understanding of law's purposes, social functions and the ways in which it gives reasons for action without taking a view as to the moral status of those reasons or purposes. We could, for instance, tell the complete story of the

We could simply accept the view, most notably championed by Ronald Dworkin, that law is a profoundly interpretive and social practice (and hence it necessarily has some evaluative dimension required by the interpretive process)<sup>44</sup>—and so any theory about law must be partly evaluative. In fact, it is hard to find any contemporary legal theory that purports to be morally neutral. Such an acceptance does not preclude juristic models from having the qualities of a conceptual paradigm and some sociologists such as Campbell would claim that this only strengthens the claim.<sup>45</sup>

In rebutting the assumption that jurisprudence as a whole must conform with a rigid determinism, Freedman suggests four reasons why laws of complete generality and uniformity are no longer the lynchpin of even the natural sciences.<sup>46</sup> First, the sciences no longer produce inductive inferences of absolutely rigid causal laws but, rather, statistical regularities that are assumed to predict what will happen in given situations, and once that regularity begins to erode the inferences become suspect. This is reminiscent of Kuhn's comparison of the Copernican and Ptolemaic systems. Second, the hard sciences now maintain a core belief in the existence of indeterminacy or chance at the heart of some physical

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Nuremberg laws (which prohibited German nationals from marrying Jews) without either condemning or advocating any moral rationale for those views in so doing: HLA Hart, *The Concept of Law* (1961).

<sup>44</sup> Ronald Dworkin, 'Law as an Applied Social Service' in *Proceedings of a Seminar: Problems and Prospects of Socio-Legal Research* (1971).

<sup>45</sup> The American Realists attempt to link social sciences such as psychology and sociology with jurisprudence by explaining judicial reasoning in difficult appellate cases by examining (non-legal) attitudes and perspectives of the individual judges. The Critical Legal Studies movement famously made concerted attempts to influence the legal paradigm by infiltrating the faculty and curricula of American law schools in the 1970s.

<sup>46</sup> MLA Freedman, 'Acquiring Social Knowledge' in *Lloyd's Jurisprudence* (6th ed, 1999) 7.

events.<sup>47</sup> Third, some hypotheses cannot be verified, but this surely does not mean that which is hypothesised about cannot exist unless and until it is verified by direct observation or measurement.

This third component of Freedman's argument is quite useful to the focus of this thesis in that it is compatible with the assertion by Popper, which Kuhn would not dispute,<sup>48</sup> that theories (or laws) are always 'tentative and provisional and liable to possible refutation'. Thus, despite the fact that the purported adversarial paradigm may be very heavily entrenched due to its proven ability to drive our juristic model for centuries, its component theories and methods are, if we accept the analogy, nevertheless tentative and open to replacement if circumstances change. They are not linked to deterministic features of the physical world—and this does not set them qualitatively apart from the natural sciences, the social sciences or the humanities.

Finally, Freedman recognises Kuhn's emphasis on the subjective and values-based influence of normal science, which, as discussed above, implies that a key reason for the continuation of a current paradigm is the state of mind of its proponents and advocates who share an entrenched commitment to their common theoretical beliefs, values, instruments and methods (and may also have, according to Freedman, the organised support and direction of government and industrial enterprise).

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<sup>47</sup> Typically illustrated by reference to the Heisenberg Uncertainty Principle in quantum mechanics, which holds that pairs of physical properties, such as position and momentum, cannot both be known simultaneously. The more precisely one property is known, the less precisely the other can be known. This statement has been interpreted in two different ways. This is not just a function of the measuring process or equipment, Ballentine asserted that this is a statement about the nature of the system itself as described by the equations of quantum mechanics: Leslie Ballentine, 'The Statistical Interpretation of Quantum Mechanics' (1970) 42 *Review of Modern Physics* 358.

<sup>48</sup> Except that Kuhn would predicate refutation on paradigm shift, with its cultural components, rather than on Popperian falsification and the effect of a single counter-example.

Freedman tracks a detailed debate in the jurisprudence and social science literature about whether law (or even the wider field of the social sciences) can be contained within the empiricist account of the natural sciences. If it can, then the four reasons above suggest that there is no reason why any juristic model, and hence any paradigm of law, cannot be conceived of as tentative and subject to fundamental change or, as Kuhn would call it, revolution. However, regardless of whether there is a close enough relationship to make that conceptual leap, Freedman concludes that:

Jurisprudence is concerned with rule-governed action, with the activities of officials such as judges and with the relationship between them and the population of a given society. But whether jurisprudence is a social science or not, the debates about methodology in the social sciences between positivists and empiricists and practitioners of hermeneutics are echoed in juristic literature.<sup>49</sup>

This seems to be a tenable position; namely, that even if we were unable to classify law as a social science, the key methodologies and features of a juristic model are analogous enough to those of a social science (and hence to a natural science), that it is a valid and insightful exercise to analyse alternative juristic models as if they were Kuhnian paradigms and capable of shifting in the Kuhnian sense. This seems to be the unspoken (and perhaps intuitive) assumption made by those scholars (such as Freiberg) who have indeed asked whether we are currently experiencing a paradigm shift from an adversarial to a therapeutic juristic model.<sup>50</sup> Without a rigorous analysis of the nature and content of the competing paradigms of course, the assumption is premature.

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<sup>49</sup> Freedman, above n 46, 11.

<sup>50</sup> Freiberg (and others) claim that in a sense the paradigm shift is well advanced. He observes that:

not only does the criminal justice system overall not function adversarially for the vast majority of cases, but that changes in a number of areas have affected the adversarial paradigm in ways that require a fundamental re-examination of the operation of the courts, of the role of judicial officers and lawyers and, significantly, of the way in which lawyers of the future are educated.

Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205.

As was discussed in Chapter 2, social sciences are those academic disciplines that study elements of human society as their raw material rather than naturally occurring phenomena. There are a wide range of social science disciplines, giving rise to a wide range of methods and (therefore) paradigms. Some social sciences, such as physiological psychology and economics, use empirical experimental methods and conventions of observation and theorising that are almost identical to those found in the natural sciences. Others use methods such as critical analysis or hermeneutics that are of more use in understanding the objects of their study (such as sociology and cultural anthropology). Some disciplines on the fringe of the social sciences (such as social work) are almost purely focused on practice and, therefore, make little use of any highly structured research methods, and are, therefore, less easily associated with any coherent, conceptual paradigm. We need to site the discipline of law, or the juristic model within this spectrum if we are to conceive of it as a social science.

There has been a traditional tension between positivist and more functionalist approaches in all of the social science disciplines, as there has been in jurisprudence. In most disciplines, the belief that the methods of direct observation and the manipulation of variables used in the natural sciences ought to form the basis of all academic research and modes of inquiry has not survived the mid 20<sup>th</sup> century. Researchers in both the natural sciences and the social sciences, even if not subscribing to a complete postmodern agenda, recognise the distorting effects of observer bias in all research. That trend is consistent with Kuhn's approach to the construction of the paradigm.

The philosopher-sociologist Jürgen Habermas takes a view of jurisprudence and the study of the law that accords well with Kuhn's emphasis on the consensus of those within a discipline as critical to the existence of a paradigm opposed to purely empirical or observational data. This is particularly so if we are conceiving of law as a way of thinking or deliberating (as a discourse) or as a way of knowing (as epistemology). As

with many of his generation, Habermas moves away from an Aristotelian, correspondence theory of truth to one of consensus. He is mainly concerned with the pragmatic qualities and effects of labelling a statement as true in line with his agenda to transform democracy into a genuinely deliberative political process. Rather than accepting that a statement is true if it accords with some naturally occurring (and observable) state of affairs, Habermas allows that the criterion for truth is a potential consensus of all those involved in a given discourse. What marks a particular consensus as credible is its compliance with an 'ideal speech situation', which Habermas defines as having a set of formal and procedural properties.<sup>51</sup> According to Teubner:

It is this proceduralization of the truth criterion which has rendered Habermas' discourse theory so important for law. It makes the theoretical-empirical discourse of the sciences directly comparable to the practical-normative discourse in politics, morals and law; their validity claims depend on the correctness of procedure.<sup>52</sup>

Social systems are arguably much more dynamic and complex than natural phenomena, and variables within a social system are unlikely to have the same predictability of interaction as, say, chemicals in a chemical reaction. This complexity and lack of predictability requires conceptually different methods that can cater for differences in what is observed, but still provide some degree of explanatory power. Many modern professions require knowledge of, and expertise in, a range of both natural sciences and social sciences and sometimes of the broader humanities. Medical practitioners, for example, study the three basic natural sciences (biology, chemistry and physics) but also social sciences such as psychology.

Law has often been characterised as being on the boundary of the social sciences and the humanities. The rules and principles of law are generally

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<sup>51</sup> Jurgen Habermas, *Theory and Practice* (J Viertel trans, 1971)—as further explained in Jurgen Habermas, 'A postscript to Knowledge and Human Interests' (1973) 3 *Philosophy of the Social Sciences* 157.

<sup>52</sup> Gunther Teubner, 'How the Law Thinks' (1989) 23(5) *Law and Society Review* 1.

mandated, articulated and interpreted based on social or economic goals and objectives as ascertained by typically social science methods. Unlike a normal scientist, Kuhn held, 'a student in the humanities has constantly before him a number of competing and incommensurable solutions to these problems, solutions that he must ultimately examine for himself'. He compared the disciplines in the following way. Once a paradigm shift is complete, a scientist cannot then explain a new phenomenon in terms of the findings, rules or accepted facts that were unique to a previous paradigm. For example, it would not be open to contemporary pathologists to claim that disease was caused by miasma.<sup>53</sup> However, a person working in the social sciences or humanities, argued Kuhn, can often select from a range of theoretical perspectives by which they can interpret or critique the findings of others within their discipline. This is to some extent true of the law and jurisprudence, which has seen a wide range of critical and theoretical perspectives develop (such as the American realists, critical race theory, postmodern jurisprudence and feminist jurisprudence).<sup>54</sup>

Fuller considers this to be a fundamental obstacle to the application of the paradigm concept to the social sciences and humanities. His interpretation of Kuhn's position in SSR is summed up in this way:

Kuhn identified his Eureka moment—when his theory of paradigms finally gelled—as occurring when he witnessed the vast difference in the way social and physical scientists conduct arguments. No matter how much physicists disagree on the value of a particular piece of research, they could always agree on an exemplar against which to judge it. This was not possible in the

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<sup>53</sup> The miasmatic theory of disease held that diseases such as cholera, chlamydia or the Black Death were caused by a miasma, a noxious form of 'bad air'. Miasma was considered to be a poisonous vapour or mist filled with particles from decomposed matter (miasmata) that caused illnesses. It was identifiable by its foul smell. This concept was displaced by the germ theory of disease, probably as late as 1890.

<sup>54</sup> I am avoiding, in this section of the chapter, a discussion as to whether therapeutic jurisprudence is in fact just another of these possible theoretical or critical perspectives or whether it has enough breadth and depth to qualify as a separate juristic paradigm. That discussion will be undertaken in Chapter 5.



social sciences where any candidate exemplar (say Marx, Durkheim, Keynes, Freud, Skinner, or nowadays Foucault) would also be a lightning rod for fundamental disagreements.<sup>55</sup>

However, there have been a number of attempts to provide a theoretical justification for extending the notion of a Kuhnian paradigm to include juristic thought (and, therefore, to legal institutions and methods).<sup>56</sup> Early attempts to do this included an explanation of the restorative justice approach to juvenile justice processes<sup>57</sup> and an explanation for the resilience of concepts of marital property law.<sup>58</sup>

Campbell has suggested that it is possible to establish the 'inherent propriety of applying Kuhn's thesis to juristic thought' by arguing at two levels in this way:

Firstly, juristic thought as a realm of knowledge is open to similar considerations as scientific thought; secondly, agreement can be reached on the question whether juristic thought is at the paradigmatic stage or the pre-paradigmatic stage.

Interestingly enough, sociologists are not only the most ardent of the academics in adopting the phenomenon of the Kuhnian paradigm shift to their own discipline, but also in arguing that legal thought (both in the sense of the judicial and legal reasoning process and in the jurisprudential

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<sup>55</sup> Steven Fuller, *Kuhn vs Popper* (2003) 22.

<sup>56</sup> There has always been debate about whether law and jurisprudence falls within the rubric of the humanities or social sciences at all, especially given that the practice of law is largely governed by rules that derive their normative force from the authority/sovereignty of their source rather than from the doctrinal or theoretical perspectives. There may be an element of intellectual isolationism and elitism in Fuller's assessment as well. He claims that despite the early Kuhn's dismissal of the social sciences as being explainable by the concept of the paradigm, that '[n]evertheless, Kuhn's admirers persisted in wrenching SSR from its original context and treating it as an all-purpose manual for converting one's lowly discipline (sic) into a full-fledged science': *ibid* 22.

<sup>57</sup> Edwin Lemert, *Social Action and Legal Change: Revolution within the Juvenile Court* (1970).

<sup>58</sup> MDA Freeman, 'Towards A Rational Reconstruction of Family Property Law' (1972) 25(1) *Current Legal Problems* 84.

realm) constitutes a Kuhnian paradigm. Some emphasis ought to be placed on this, given that sociology is the discipline most concerned with analysing and classifying other academic fields and their relevant worldviews.

Within the field of the sociology of knowledge, a number of influential figures have defended the view that juristic thought represents a paradigm. Well before the advent of some of the most influential schools of jurisprudence and before the exposure of the myth of the declaratory theory of judging, Aubert reached the view that there was a significant similarity in methods of legal reasoning, modes of legal decision making, the construction of legal propositions, shared assumptions and standard methodologies—as well as a reflection of these methods and assumptions in many schools of jurisprudence. These are all indications, argued Aubert, of the clear existence of a classic disciplinary paradigm.<sup>59</sup>

Campbell allows<sup>60</sup> that there are sufficient commonalities, from a sociological perspective, between legal thought and scientific thought and between juristic activity and scientific activity, to accept that law and legal theory operate pursuant to a paradigm, even if only for purposes of heuristics or exegesis.<sup>61</sup> With the benefit of another decade of

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<sup>59</sup> Vilhelm Aubert, 'The Structure of Legal Thinking' in J Andenaes et al (eds) *Legal Essays: A Tribute to Frede Castberg* (1963) 41–63. See also Vilhelm Aubert, 'Researches in the Sociology of Law' (1963) 7 *American Behavioural Scientist* 16, 18, where he concludes that 'legal methods, legal conceptualisations and the underlying theory share an identity or internal coherence which has, indeed, remained constant over time'.

<sup>60</sup> CM Campbell, 'Legal Thought and Juristic Values' (1974) 1(1) *British Journal of Law and Society* 13.

<sup>61</sup> In terms of heuristics, Campbell means that even if we study law for the purposes of uncovering the set of simple and efficient rules that have evolved in the common law jurisdictions to try and reduce complex social and legal problems to contests between relatively simple propositions, rights and values, a paradigm readily emerges. In terms of exegesis, if we study law to uncover and explain the historical and cultural backgrounds and contexts of the authors of law, their texts and intended audiences, a paradigm also readily appears.

jurisprudence to survey (after Aubert), Campbell also acknowledged that any number of emerging legal theories could represent a new paradigm in terms of suggesting changed values, standards and criteria for selecting problem areas for research and for 'accepting the legitimacy of solutions'.<sup>62</sup>

A hypothesis can be disproved by one contrary and reproducible observation. It is not particularly useful to view class propositions, assertions and explanations in law as hypotheses. For example, we could assert that drug courts are more effective than mainstream courts in reducing recidivism rates among drug-addicted offenders. An observation of one court or jurisdiction where that has not been the case for a particular period is not that useful in terms of the overall assertion. A theory is a bit more resilient than that; the theory can be modified. A paradigm will not be as easily shifted by anomalies as a hypothesis or a theory. This is why the paradigm has to do more than these other simpler concepts. Campbell concludes that:

legal theory and jurisprudence do operate under a particular paradigm. This paradigm, derived from the commitments and reasoning of practical lawyers, involves a particular 'world view', an orientation to practical and pragmatic problem-solving, and set methods for tackling these problems. For the disciples the paradigm involves acceptance of the legal system as given, and, by operating within the framework of the legal system, an adoption of its particular standpoints in interpreting or constructing reality. With its focus on the pragmatic concerns of decision-making and the perspective of the judge in recognising as 'legal' certain factual situations and in deciding what particular legal meaning to attach to them, legal theory adopts a social control standpoint. Its 'exemplars' and puzzle solutions follow from the judicial process as does its methodology in seeking to answer such questions. Commitments and stances of this sort go to make up the paradigm—the constellation of beliefs, values and techniques that is shared by members of the jurisprudential community.<sup>63</sup>

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<sup>62</sup> Campbell, above n 60, 16.

<sup>63</sup> Ibid 22.

The argument in the chapters that now follow is that as competing paradigms, both adversarialism and therapeutic jurisprudence share the general quality of social control that Campbell asserts. However, they differ in relation to the objectives of that control in what it means to say that a certain fact situation has a legal status and that the puzzle solutions within a therapeutic paradigm would subsume and to some extent redefine and add to those that exist under the adversarial paradigm.

### **3.6 Conclusion**

As was seen in Chapter 2, the earlier comments by Kuhn (in SSR) that seemed to indicate that he considered disciplines outside of the hard sciences to not be governed by paradigms<sup>64</sup> collapsed into an assumption that researchers and practitioners in the social sciences and humanities would have no need for, nor interest, in a history of disciplinary change that focused on commonalities with science. However, in the 1969 postscript, Kuhn acknowledged that differences in methodology were secondary to similarities in worldview and the ways in which disciplines educate their new members and rely on orthodoxy to preserve order within the discipline.<sup>65</sup>

This is not to say that Kuhn simply dismissed any differences between science and other disciplines. He certainly did not. However, he did allow that such differences were not of a nature to preclude the migration of the paradigm phenomenon beyond the hard sciences. He concedes that 'scientific development may resemble that in other fields more closely than has been supposed'.<sup>66</sup> Indeed, Kuhn closes the SSR postscript by noting that:

I shall close by underscoring the need for ... comparative study of the corresponding communities in other fields. How does one elect, and how is one elected to membership in a political

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<sup>64</sup> See section 2.4 in this thesis.

<sup>65</sup> SSR 208.

<sup>66</sup> Ibid 209.

community, scientific or not. What is the process and what are the stages of socialization to the group? What does the group collectively see as its goals, what deviations, individual or collective, will it tolerate; and how does it control the impermissible aberration?<sup>67</sup>

While it may be true, perhaps more so at the time of Kuhn writing the postscript to SSR in 1969, that there seems to be less competing schools of thought within the academic branches of the hard sciences than in the social sciences and humanities, these latter disciplines have strongly endorsed the paradigm concept and its emphasis on the internal culture and social architecture of a discipline. Jurisprudence and movements for the reform of legal practice rank highly among these. Campbell sets the minimum level of applicability of Kuhn to jurisprudence as being for the purposes of heuristics and exegesis. Even if we simply posit and analyse a juristic model in order to make explicit some set of simple and efficient rules that have evolved in the common law jurisdictions to attempt to reduce complex social and legal problems to contests between relatively simple propositions, rights and values, a paradigm readily emerges. The extent to which the adversarial juristic model connotes this is explored in the following chapter. In terms of exegesis, if we study law to uncover and explain the historical and cultural backgrounds and contexts of the authors of law, their texts and intended audiences, a paradigm also readily appears.

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<sup>67</sup> Ibid.

## Chapter 4

### The Adversarial Paradigm

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#### 4.1 Introduction

If juristic models are valid candidates for Kuhnian paradigms, then it should follow that what is almost universally referred to as the adversarial system operates pursuant to a paradigm. It may be that an adversarial paradigm is the only paradigm that has ever defined the modern (post-18<sup>th</sup> century) common law legal world.<sup>1</sup>

Academic and judicial writings debating whether adversarialism is, or is not, the best and most efficient method of dispensing justice are legion.<sup>2</sup> This does not beg the question as to whether adversarialism is the current paradigm. It assumes that it is so. The assumption is that although there

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<sup>1</sup> It could also be argued that there exists an inquisitorial paradigm that regulates the legal systems of the Western European jurisdictions. See Bron McKillop, 'What Can We Learn from the French Criminal Justice System?' (2002) 76 *Australian Law Journal* 49.

<sup>2</sup> Although citations for examples of such works are surely unnecessary given their ubiquity, an interesting compilation and distillation of some common themes can be found in Evan Whitton, '21 Reasons You Won't Get Justice from the Adversarial Court System', *Online Opinion*, 7 April 2003 <<http://www.onlineopinion.com.au/view.asp?article=268>>.

are variations,<sup>3</sup> from jurisdiction to jurisdiction, and from time to time, there is a core of principle, method and belief that defines the model.

Chapter 2 set out the Kuhnian position that a loosely organised and ad hoc field or discipline progresses from a pre-paradigm state to a mature science when it develops a set of exemplars, which practitioners accept as defining what it is to do normal science within that discipline, thereby giving rise to a paradigm. A period of normal science consists merely of the work of practitioners and researchers working within the limiting exemplars of that discipline. A period of normal science is usually very lengthy and it is convergent, rather than divergent, in the sense that true innovation is discouraged, and any apparent success of novel methods suffers a regression to the mean—they are seen as either statistical anomalies or practices existing at the margin of the discipline.<sup>4</sup>

A period of normal research and science in a field as diverse and crucial to the functioning of society as the law, which is practiced and analysed by many thousands of practitioners on a daily basis, will inevitably give rise to anomalous data and intractable problems that resist resolution by the normal methods of the discipline. As the ability of the new methods to deal with the intractable problems of the existing paradigm accelerates, practitioners lose faith in the existing paradigm and a disciplinary crisis emerges. In this chapter, I examine the extent to which anomalies within jurisprudence and the practice of law have been absorbed and marginalised, or expressed as mere refinements within the adversarial system, as evidence that adversarialism has the quality of a paradigm. Significant changes to proceedings that have traditionally been

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<sup>3</sup> For a discussion of the great variety of adversarial and inquisitorial approaches in legal procedure, see Oscar Chase, 'American Exceptionalism and Comparative Procedure' (2002) 50 *American Journal of Comparative Law* 277.

<sup>4</sup> In the case of therapeutic jurisprudence, this marginalising phenomenon might be what Freiberg referred to as 'pragmatic incrementalism'. Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2003) 20(2) *Law in Context* 6.

indisputably adversarial in nature are now being referred to, for example, as 'less adversarial proceedings'.<sup>5</sup> In order for change to be seen as valid, it must be conceptually consistent with the current paradigm.

Since new methods may strike at the heart of the existing paradigm, which is populated by exemplars that are based on powerful worldviews and values, resistance to the emerging paradigm tends to be articulated in calamitous language. Work within a period of normal science is cumulative as methods and processes build incrementally on the exemplars developed in the transition from the pre-scientific period to that of mature science. I argue that an identifiable adversarial juristic model has developed in this way over the past three centuries. The work around a new paradigm, conversely, is non-cumulative in that it represents an epistemic rupture (in the sense suggested by Bachelard in Chapter 2) and a break from orthodoxy. The techniques and research of those working within the new paradigm build on *each other*, not on the techniques and research of the old paradigm.<sup>6</sup>

In addressing the assumption that adversarialism is paradigmatic, we need to recall that Kuhn provided differing and evolving conceptions of what a paradigm is. In the earlier chapters of SSR, he emphasises the existence of exemplars that are concrete and analytical. Practitioners refer to them to solve problems. They are efficient and satisfying enough to appeal to the current worldview of potential practitioners but flexible enough not to stifle innovation (so long as the innovations do not

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<sup>5</sup> Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93. See also *Less Adversarial Trial Handbook* (2009) <[http://www.familycourt.gov.au/wps/wcm/resources/file/eb08eb04841dff4/LATReport\\_100609.pdf](http://www.familycourt.gov.au/wps/wcm/resources/file/eb08eb04841dff4/LATReport_100609.pdf)>.

<sup>6</sup> The extent to which innovations are credited as being products of, or inspired by, therapeutic jurisprudence are held by their advocates to be building on existing adversarial practices or building a separate body of theory and practice is a key focus of Chapter 6 of the thesis.



contradict the exemplars). In this sense, practitioners are perhaps less likely than academic and theoretical researchers to characterise innovations as part of an alternative paradigm. If the innovations are mostly allowed to operate (albeit at the margins of the discipline), then the practitioners working in the margins are probably willing to accept marginalisation rather than run the risk of rejection and ridicule by threatening the core assumptions and values of the existing paradigm.

The exemplars, though, exist alongside the metaphysical commitments that are expressed in terms of preferred analogies or models that are used for parsing and taxonomising the domain of reality being studied, and the methodological values that the community of practice agrees characterise their work. The exemplars are paradigms in the narrower, analytical frame of reference. However, the wider sense of the paradigm is this whole disciplinary matrix and the matrix is a product of consensus (sometimes tacit), not some purely positivist representation of reality.<sup>7</sup> In this chapter, I argue that the historical development of the adversarial paradigm has followed just such a pattern. It has been an ad hoc and pragmatic process where procedures and rules have been cemented largely as a result of tacit consensus and tradition. Many adversarial procedures persist, as asserted below by Davies,<sup>8</sup> despite the original rationale for their existence having become obsolete.

In the later chapters of SSR and in the 1969 postscript, Kuhn places greater emphasis on this social construction of the paradigm. Exemplars provide for a shared framework that allows for an ease, fullness and directness of communication within a scientific community and for the

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<sup>7</sup> The primary reliance on oral evidence in civil and criminal trials, for example, developed because most jury members in the 18th and 19th centuries were illiterate. Most jurors in the 21<sup>st</sup> century are, presumably, literate: Geoffrey Davies, 'Why We Must Abandon the Essential Elements of Our System' (2003) 12(3) *Journal of Judicial Administration* 155, 157.

<sup>8</sup> See *ibid*, generally.

‘unanimity of professional agreement’.<sup>9</sup> This is not just some shared agreement or consensus about a theory, it is a consensus about a model. To that end, this chapter also examines the social construction of adversarialism to illustrate its paradigmatic qualities.

## **4.2 The Common Law Tradition—Pre-Paradigm Phase and the Journey to Normal Science**

### **4.2.1 Pre-Enlightenment Legal History—Feuds, Ordeals and the Rise of Public Regulation of Disputes**

We can trace the emergence of the adversarial system as the juristic paradigm for the common law world back to the significant reforms to criminal and civil trial procedure in England in the 18<sup>th</sup> century. This was the culmination of a centuries-long pre-paradigm phase, where legal processes were almost inseparable from political processes, dictated by a succession of autocratic systems of governance. The gradual displacement of the legislative power of the monarchy and the devolution of the power of the state to representative bodies gave rise to a more meaningful conception of social and political rights, and of personal autonomy. This process, as discussed below, was not necessarily motivated by any shift in political beliefs about the intrinsic rights of individuals, so much as a felt need to more efficiently manage relationships between people and property in a changing industrial context. Some 20<sup>th</sup> century academics, such as Foucault,<sup>10</sup> characterise this management of relationships in terms of the social construction of identity and of the increasing political power of the middle class in Europe.

This slow, and often bloody, social and political evolution has led to a situation where, for some critics, questioning the primary (and often exclusive) importance of due process in legal procedure is synonymous with an attack on freedom and human rights. The struggle for

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<sup>9</sup> SSR 207.

<sup>10</sup> Michel Foucault, *Discipline and Punish—The Birth of the Prison* (1975).

constitutional recognition of the right to a fair trial and to have disputes objectively and independently adjudicated has been so long and arduous that, as Kuhn and others suggest, the belief in the paradigm borders on the religious.<sup>11</sup> The history of the legal system in England is a history of the creation and recognition of personal rights.<sup>12</sup> Adjudication is the cornerstone of adversarialism—and it constructs interpersonal dynamics as a dispute.

The Romans left Britain shortly after 400 AD, and over the next two centuries, invading tribes from Europe completely displaced Roman civilisation and ensured there was no continuity of legal tradition and hence no possibility of any surviving juristic paradigm based on the heavily codified Roman law. Post-Roman, Saxon England was a conglomeration of agricultural communities where murder and theft were dealt with by self-help in the form of vengeance and blood feuds. Feuding could be effective in preventing and deterring crime, to some degree, because the expectation would be that the commission of an offence would attract immediate reprisal and retaliation.

General deterrence, the belief that the commission of an offence is an economically irrational decision, is still the chief rationale and justification for the imposition of criminal sanctions in the 21<sup>st</sup> century (at least to those committed to the adversarial paradigm), and held by some analysts to be

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<sup>11</sup> For example, the oath of political allegiance in the US, has an overt religious element, enmeshed with statements about political freedom and due process: 'I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all'. Interestingly, the addition of the phrase 'under God' was adopted by the US Congress as recently as 1954, and was an overt expression of difference to the quality of State atheism in the communist bloc nations. See Scott Merriman, *Religion and the Law in America: An Encyclopedia of Personal Belief* (2007).

<sup>12</sup> In this section I survey some defining features of that lengthy pre-paradigm phase in order to illustrate how it aligns with the Kuhnian conception of a pre-paradigmatic discipline, but do not intend it to be a comprehensive discussion of English legal history.

the only sentencing purpose that is empirically justifiable.<sup>13</sup> This nexus, between the belief in a divine law that informs human law and a need for social control based on deterrence, is one theme that does survive, and to a great extent informs the criminal law through the pre-paradigmatic phase right into the current conception of adversarial criminal justice. Thomas Aquinas articulates concepts of both general and special deterrence for the 13<sup>th</sup> century that sound startlingly similar to contemporary criminal jurisprudence:

A severe punishment is inflicted not only on account of the gravity of a fault, but also for other reasons. First, on account of the greatness of the sin, because a greater sin, other things being equal, deserves a greater punishment. Secondly, on account of a habitual sin, since men are not easily cured of habitual sin except by severe punishments. Thirdly, on account of a great desire for or a great pleasure in the sin: for men are not easily deterred from such sins unless they be severely punished. Fourthly, on account of the facility of committing a sin and of concealing it: for such like sins, when discovered, should be more severely punished in order to deter others from committing them.<sup>14</sup>

A more complex trading and commercial environment led to the convening of some ad hoc civil and criminal tribunals presided over by heads of households, until the enactment of some rudimentary laws (known as dooms) by the rulers of the four Anglo-Saxon kingdoms in England during the 500s.<sup>15</sup> Very few Anglo-Saxon dooms have survived in the written record, and even less is known about legal procedure of that time. It is apparent, however, that compensation for the victims of crime (rather than adjudication) was seen as more conducive to preserving peace and the social fabric needed to ensure the survival of small agricultural communities that provided the larger state with taxes.

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<sup>13</sup> A significant econometric study of the effectiveness of general deterrence can be found in Andrew Von Hirsch et al, *Criminal Deterrence and Sentence Severity* (1999) 28.

<sup>14</sup> Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province trans, 1948) 1096 [first published 1265–74].

<sup>15</sup> Frank Stenton, *Anglo-Saxon England* (1971) 279; Alan Harding, *The Law Courts of Medieval England* (1973) 17.

Those engaged in blood feuds were ordered, on the authority of these laws, to end hostilities and to agree to terms of settlement among themselves. To facilitate this private resolution of grievances, however, set tariffs were posted as the basis of restitution for given offences and losses.<sup>16</sup> The amount of the tariff varied according to the social status of the offender or litigant. No personal antecedents of the offender were taken into account and criminal responsibility was assumed. No defences or excuses existed. The tariff contained a component of restitution for the victim and a component paid as an indemnity to the king. This commercial interest of the Crown in litigation was one significant origin of political interest in litigation, heralding the eventual transformation of both civil and criminal law from the private to the public sphere.<sup>17</sup> This partial public usurping of legal procedure was essential as a precursor to a developed economy that would require systemic regulation.

The private settlement of legal disputes was not, however, a matter of an objective analysis of factual evidence. Although there was an assumption of divine sanction to the process, the seeds for state-regulated adjudication were being sown. An accused person needed to address the allegations of a complainant by an appeal to God, through the assistance of oath helpers or via a trial by ordeal. An oath helper would speak to the good character of the accused, who would be required to swear his innocence before God. If the accused was able to requisition sufficient numbers of oath helpers, then that was considered to be conclusive evidence of his innocence. In the absence of these character witnesses, judgment of God by the ordeal was required. According to the (formal)

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<sup>16</sup> Interestingly, some key elements of this juristic model can still be found in the jurisprudence and operation of the Roma courts or Kris in both Europe and North America. See WO Weyrauch (ed), *Gypsy Law: Romani Legal Traditions and Culture* (2011); TA Acton, 'A Three-Cornered Choice: Structural Consequences of Value-Priorities in Roma Law as a Model for More General Understanding of Variations in the Administration of Justice' (2003) 51(3) *The American Journal of Comparative Law* 639–58.

<sup>17</sup> John Hostettler, *A History of Criminal Justice in England and Wales* (2009) 15.

Anglo-Saxon worldview, ordinary men had no facility to determine guilt or innocence, which were qualities reserved for a divine arbiter.

The trial by ordeal was held within the jurisdiction of the church.<sup>18</sup> The role of the oath helper was abolished, purportedly due to the prevalence of perjury in 1166, making ordeal by hot water<sup>19</sup> the only alternative, although this was never seen as punishment.<sup>20</sup> It has been suggested that the trial by ordeal, being administered by the clergy, was engineered (by selecting the quality of the bandages or the heat of the water, for example) so that those who were most disliked by the community, or considered most likely to threaten the social and political order, were unlikely to pass the ordeal.<sup>21</sup> However, in most cases, if the surviving records can be trusted, people were acquitted by the ordeal. Hostettler cites an 1888 study of the surviving records by Maitland, which found only one case in which the ordeal did not acquit the accused.<sup>22</sup> The rationale for this may have been a pragmatic belief that the trial allows a man who is guilty in fact to purge the wrong and, therefore, to be held morally innocent in the sight of God.<sup>23</sup>

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<sup>18</sup> George Fisher, 'The Jury's Rise as Lie Detector' (1997) 107 *Yale Law Journal* 587.

<sup>19</sup> Hostettler, above n 17, 15, describes the ordeal in this way:

For this an iron cauldron was placed over a fire in a church. When the water boiled, the accused had to reach down into the vessel and snatch up a stone from the bottom. The hand and arm were then swathed in cloth or linen for three days, after which they would be exposed and if the flesh was uninjured God had pronounced the accused not guilty. If the flesh was badly scalded he was guilty and sentenced by the court, usually to death.

<sup>20</sup> Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I* (1895) 138.

<sup>21</sup> Margaret Kerr, 'Cold Water And Hot Iron—Trial By Ordeal In England' (1992) 22 *Journal of Interdisciplinary History* 582.

<sup>22</sup> Frederic Maitland, *Select Pleas of the Crown* (1888) 75, cited in Hostettler, above n 17, 21. Leeson suggests that the main reason for the very high acquittal rate for ordeals was that those who genuinely believed in their innocence, or the justice of their plaint, were more likely to resort to an ordeal since they believed they would succeed. Those who had a consciousness of guilt would be more likely to settle and pay compensation. Thus, the clergy, as suggested above, would deliberately ameliorate the conditions of the relevant ordeal to ensure that those undertaking it would prevail.

<sup>23</sup> Trisha Olson, 'Of Enchantment: The Passing of the Ordeals and the Rise of the Trial by Jury' (2000) *Syracuse Law Review* 113.

The ordeal fell into disuse when a more secular society allowed for a migration of power from the church to the state, and when a critical mass of clerics found the duty to be inconsistent with a changing view of their ecclesiastic role.<sup>24</sup> Its subsequent demise created the sort of chaotic conceptual environment that so characterises the Kuhnian conception of a pre-paradigmatic discipline. Fisher underscores the role of the ordeal in observing that:

the institutional brilliance of the ordeal was that it so neatly merged the appearance of divine judgment with the reality of a great measure of human control ... in the trial jury the English justice system managed to produce this very useful combination of traits ... it may be impossible to understand even the later history criminal trial without a theory about why the ordeal worked so well and about what its demise left lacking.

The ordeal gave the quality of divine sanction to human judgment, making it more likely to garner community support and confidence. It could be argued, by analogy, that the sanction of natural justice and due process are the characteristic guarantees of the modern justice system on which its public confidence is based. It is worth noting here, however, that the overriding rationale for the therapeutic jurisprudence movement is to make litigation far less of an ordeal, while retaining public confidence and a respect for rights.<sup>25</sup>

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<sup>24</sup> Bartlett observes that:

Secular authorities understood the importance of priestly participation to ordeals. Operation. A decade before the Church banned them, some clerics decided for themselves that ordeals were at odds with their religion. They stopped administering them. But secular authorities would have none of it. As Pope Innocent III complained: 'Although canon law does not admit ordeal by hot iron, cold water and the like, unhappy priests are being compelled to pronounce the blessing and become involved in such proofs and are being fined by the secular officials if they refuse.'

Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (1986).

<sup>25</sup> David Wexler has expressly endorsed Slobogin's definition of therapeutic jurisprudence as 'the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects': Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1(1)

#### 4.2.1 Industrialisation and a More Forensic Legal System—The Institutionalising of Due Process Exemplars

Landsman observes that:

[t]he fundamental expectation of an adversarial system is that out of a sharp clash of proofs presented by litigants in a highly structured forensic setting, will come the information upon which a neutral and passive decision maker can base a satisfying resolution of the legal dispute.<sup>26</sup>

He notes that nobody set out to design the adversarial system. It was neither part of a grand governmental design, nor the scheme of ingenious legal philosopher.

The emergence of the quintessential, procedural exemplars of the adversarial model can be traced to developments within the criminal courts of the mid 1700s. Langbein observes that:

[t]he judges attempted to admit defense counsel at trial for the limited purpose of assisting the defendant to probe accusing evidence, expecting that the defendant would otherwise continue to speak in his or her own defense. By articulating and pressing for the enforcement of the prosecutorial burdens of production and proof, defense counsel largely silenced the defendant, leading to the beyond-reasonable-doubt standard of proof, and the privilege against self-incrimination. The adversary dynamic changed the very theory of the criminal trial. Whereas the old altercation trial had been understood as an opportunity for the accused to speak in person to the charges and the evidence against him, adversary criminal trial became an opportunity for defense counsel to test the prosecution case.<sup>27</sup>

Langbein refers to the pre-adversarial form of the criminal trial as the ‘accused speaks’ trial. In this style of litigation, the accusing citizen(s) confronted the accused in an altercation-style trial. No defence advocate was permitted and prosecutors were rarely used. The accused citizen engaged in a running bicker with the accusers. The purpose of this direct

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*Psychology, Public Policy and Law* 193–219; David Wexler, ‘Reflections on the Scope of Therapeutic Jurisprudence’ (1995) 1(1) *Psychology, Public Policy and Law* 222.

<sup>26</sup> Cited in Hostettler above n 17, 26.

<sup>27</sup> John Langbein, *The Origins of Adversary Criminal Trial* (2003) 257.



communication was to allow the accused to speak in his own defence, with a judge to moderate in much the way a referee would do in a contact sport. The judge took quite an interventionist role in this sort of proceedings, calling on the accuser(s) to particularise their charges and lead evidence and on the accused to respond to substance rather than to issue simple denials.

A contemporary explanation of the rationale for the 'accused speaks' trial reads:

The innocent accused will be as able to defend himself on 'a Matter of Fact, as if he were the best Lawyer,' whereas 'the Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them.'<sup>28</sup>

However, once the admission of lawyers to prepare evidence, brief advocates and to deal with an increasingly complex regulatory environment became common, both the judge and the litigants became relegated to the background. The judge became the arbiter of procedure, of the conduct of the lawyers and of the application of a developing law of evidence. This was not an intellectually passive role by any means, but to someone more familiar with the interventionist style of judging prevalent in the inquisitorial system developing in continental Europe, the judge appeared even disinterested in the proceedings. The French correspondent Cottu, observing a criminal trial in 1820, noted that the English judge 'remains almost a stranger to what is going on', and that the accused did so little in his own defence that 'his hat stuck on a pole might without inconvenience be his substitute at the trial'.<sup>29</sup>

As the legal and judicial process became abstracted in this way, its paradigm status began to be lauded and cemented almost immediately. 18<sup>th</sup>-century criminal barrister John Adolphus described the experience in this way:

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<sup>28</sup> William Hawkins, *A Treatise of the Pleas of the Crown*, vol 2 (1931) 400; *R v Arthur Hedge esq.* (1812).

<sup>29</sup> Cottu, *Administration* 88, 105, cited in Langbein, above n 27, 253.

I cannot describe the effect produced on my mind by the first hearing of an impassioned address, quick taunt, convincing reply, and above all the *viva voce* examination of witnesses and the comments on their evidence.<sup>30</sup>

This passionate conversion to the world of adversarial advocacy, hinted at by Adolphus, illustrates the cultural power of a paradigm to attract practitioners. Kuhn downplayed the role of the rules of methodology in delineating a paradigm, but placed primary value on the mutual understandings among practitioners about what it means to work in a given discipline. Polanyi refers to these shared disciplinary understandings as the ‘tacit knowledge’ of a discipline. The ‘knowing how’ is much more definitive of a discipline than the ‘knowing what’.<sup>31</sup> The path from the pre-paradigm phase to paradigm phase within a discipline leads to cognitive restructuring of those within the paradigm. Polanyi, like Kuhn, emphasises the appearance of these passionate commitments to the worldview of the paradigm as creating a logical gap between those within and without.

The increased focus on rights, and the belief that standardisation of procedure (due process) was the best means of protecting them, was the real genesis of the adversarial paradigm. Once standardised court and litigation procedures were in place, then rules of evidence and of advocacy and judging followed quickly. These became the exemplars on which the adversarial system rested. It became all too natural for students and researchers of the law to see their function as exploring the nature, extent and limit of emerging doctrines (of both the substantive law and of legal procedure). To this day, legal research is largely referred to as doctrinal research. Once the exemplars are in place, says Kuhn, then ‘[w]ork under the paradigm can be conducted in no other way, and to desert the paradigm is to cease practicing the science at all’.<sup>32</sup>

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<sup>30</sup> Cited in John Hostettler, *Fighting for Justice: A History of Adversary Trial* (2006).

<sup>31</sup> Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (1962).

<sup>32</sup> SSR 34. This, in part explains the significant resistance to therapeutic jurisprudence from some members of the judiciary (particularly in North America) who see it, possibly correctly, as an assault on adversarial exemplars. See, eg, Eric Cohen, ‘The Drug Court

Exemplars are more than just sets of facts that provide answers to problems. They are models, generated by values and ideals as much as practical experience, and so they have significant normative and directive force. Thus, once paradigmatic exemplars are in place, they do not just tell practitioners what to do, they tell them why to do it that way. This normative entrenchment brings certainty and a sense of moral justification that gives purpose and clarity to practitioners. Given the necessary relationship between worldview and ideology to paradigms (discussed in Chapter 2), we can see that once the adversarial system became paradigmatic, there was no going back to a pre-paradigm phase within the liberal democracies—apart from political revolution or coup. The adversarial paradigm is, to some extent, enmeshed at a constitutional level in Australia and England.<sup>33</sup>

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Revolution: Do We Want Theory Rather Than Justice to Become the Basis of Our Legal System?', *The Weekly Standard*, 27 December 1999, 20; Morris Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' (2002) 29 *Fordham Urban Law Journal* 2071; Elizabeth Kates, 'Why Therapeutic Jurisprudence Must be Eliminated from our Family Courts' 13 *Domestic Violence Report* 65 (2008); Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th Annual AIJA Conference, Adelaide, Spring 1999) 5 <<http://www.ajia.org.au/online/mason.rtf>>; Dennis Roderick and Susan Krumholz, 'Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence' in MF Miquelon-Weismann (ed) *Trends and Issues in Scientific Evidence* (2007) vol 1, 201. Whether a fairly narrowly defined conception of due process ought to be at the centre of our juristic paradigm is a deeply normative question that this thesis does not seek to answer. However, I do suggest, in Chapter 6, that the perception of a crisis in the ability of due process to explain anomalies in the practice of law is real.

<sup>33</sup> See for example s 80 of the *Commonwealth of Australia Constitution Act 1900*, which provides that:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

### **4.3 The Practice of Law in the Adversarial Context—Exemplars**

As discussed above, the adversarial system of law that has developed over the past 200 years has become forensically complex. This has, arguably, resulted in litigation and court processes that are very effective in finding the truth and in accurately adjudicating between competing legal rights and the evidence supporting them. The fact that civil and criminal appeals can often be decided on very fine points of law is testament to this forensic complexity. Such accuracy and attention to detail in a very strict regulatory environment is, however, labour intensive. This means that adversarial legal resolutions to problems are expensive. Civil litigation is beyond the means of the average citizen and of most smaller enterprises. Criminal procedures are equally expensive, resulting in a legal aid system that is in perennial economic crisis in terms of its ability to deliver services, and significant delays in bringing matters to court.

According to Kuhn, normal science is a craft. The craft exists to give purpose to the paradigm. Practitioners within a discipline in a time of normal science work within exclusive and conservative communities that he claimed resembled medieval guilds more than dynamic, democratic groups. The discipline of law is virtually a tailor-made example of the Kuhnian conception of a discipline compared to that espoused by Popper and the positivists. Popper claims that practitioners learn from their mistakes, thereby enabling incremental (rather than revolutionary) developments of a theory or field as particular hypotheses are falsified. However, Kuhn asserts that it is success that drives learning during a time of normal science. The exemplar problem solutions are applied to new puzzle situations and thereby reinforced. Anomalies are marginalised as puzzles that have no place in the current field—they are puzzles to be solved by another discipline (or perhaps by interdisciplinary work where the exemplars of the companion discipline are definitive). Nickles articulates the difference in this way:

Normal scientists belong to closed, conservative communities of practitioners that resemble medieval guilds more than relatively undisciplined, democratic, Enlightened, Popperian open societies. Whereas Popper and the logical empiricists, like most Anglo-American philosophers, are children of Descartes' method of doubt, a Kuhnian research community is so deeply committed to the rectitude of its dogmas and practices that it can be said to follow something like the medieval way of belief.<sup>34</sup>

The fundamental statement of the nature of judicial power by the High Court of Australia is that it is essentially a power of a sovereign authority to 'decide controversies between its subjects, or between itself and its subjects, where the rights relate to life, liberty or property'.<sup>35</sup> Judicial power, in other words, is adjudicatory (it is only to be exercised to make binding decisions) and it constructs those who seek its exercise as adversaries (the parties to a 'controversy'). In *Leeth v Commonwealth* Judges Deane and Toohey asserted that the provisions of Chapter III of the Commonwealth Constitution did more than simply bestow federal judicial power in the federal courts, they placed limits on the scope and nature of that power. They said that:

They also dictate and control the manner of its exercise. They are not concerned with mere labels or superficialities. They are concerned with matters of substance. Thus, in Ch.III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially.<sup>36</sup>

The use of such normative phrases as 'the essential attributes of a court', 'the curial process' and 'act judicially' assumes that there is an identifiable and prescriptive set of features or rules by which these qualities can be measured and assessed. That is, there must exist a set of disciplinary exemplars that receive at least tacit, universal support from practitioners

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<sup>34</sup> Thomas Nickles, 'Scientific Revolutions' in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2011).

<sup>35</sup> *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 per Griffith CJ.

<sup>36</sup> *Leeth v Commonwealth* (1992) 174 CLR 455, 486–7.

(judges and lawyers in this case). The implication is that these exemplars hold normative force or, in other ways, to act in contravention of them is to act outside of the discipline (literally outside of the law).<sup>37</sup>

The entrenchment of judicial power as an exclusive power of judges presiding in Chapter III courts in Australia is an entrenchment of the Doctrine of the Separation of Powers. It is an attempt to protect the courts from interference from the legislature. However, it assumes that judicial power is capable of analytical and precise definition—an assumption that we could observe a particular activity undertaken by a judge and assess it against such a definition to determine whether it is, in fact, judicial. This is a sign of a juristic model determined to define itself as a paradigm in order to cement its authority and exclusivity. If a given judicial activity or role does not accord with ‘traditional judicial procedures, remedies and methodology’<sup>38</sup> then it is invalid.<sup>39</sup> If there existed an increasing number of judicial roles and functions<sup>40</sup> that did not accord with ‘traditional judicial procedures, remedies and methodology’, then these would be characterised by Kuhn as anomalies. A sufficient number of anomalies would indicate a transition from a period of normal science to a period of disciplinary crisis.

The adversarial paradigm is partly an *assumption* that those who access the courts do so because they are adversaries (whether they be private

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<sup>37</sup> A detailed analysis of the possible content of the due process requirements placed on Chapter III courts has been undertaken by Fiona Wheeler, ‘The Doctrine of the Separation of Powers and Constitutionally Entrenched Due process in Australia’ (1997) 23(2) *Monash University Law Review* 248.

<sup>38</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 614–15.

<sup>39</sup> In *Polyukovich v Commonwealth* (1991), Deane J at 614 says that:

The provisions of Chapter III are based on an assumption of traditional judicial processes, remedies and methodology. They confer jurisdiction, that is, the curial power of declaration (*dictio*) of the law (*jus*). A matter must be such that it can be determined upon principles of law.

<sup>40</sup> Many of the roles and functions of courts operating pursuant to therapeutic jurisprudence principles clearly do not accord with these—as will be discussed in Chapter 6.

individuals or individuals in dispute with the state), and that they will remain adversaries for at least so long as their matter continues to be before the court. However, the paradigm *expects* and *requires* them to be adversaries. The court fundamentally exists to resolve the dispute by declaring a winner, or to coerce the litigants into a settlement, not to change those elements of the relationship between the parties that led to the dispute.<sup>41</sup> The pragmatic but naïve assumption is that community stresses and tensions are necessarily reduced by ending the dispute, not by working on or repairing dysfunctional relationships or lives. As discussed above, adversarial trials also serve a symbolic and cultural purpose, providing a certain measure of catharsis by the very nature of the ritual itself. In comparison to inquisitorial systems, for example, advocates of the adversarial trial claim that the emphasis on the participation and control of the litigant parties themselves is essential.<sup>42</sup>

There is also little doubt that powerful and influential sections of the legal profession and the judiciary view some elements of the adversarial process as so intrinsic to their role as officers of the court that they cannot be dispensed with, and that this commitment to the perceived integrity of the system then also becomes a source of their power. McEwan claims that the formation of a professional bar in 18<sup>th</sup>-century England led to an emotional commitment by the English bar to traditional adversarial features such as ‘cross-examination, non-disclosure of the defence case and the labyrinthine complexities of the rules on the admissibility of the

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<sup>41</sup> The existence of some restorative, therapeutic and less adversarial processes and courts (which are seen as ‘specialist’) underscores the assertion that these deviate from the conceptual and legal norm.

<sup>42</sup> Sward asserts, for example, that ‘[c]urrent ideology extols the adversary system primarily as the best system for protecting individual dignity and autonomy’: E Sward, ‘Values, Ideology and the Evolution of the Adversary System’ (1984) 64 *Indiana Law Journal* 301, 302. Further elaboration of the value of autonomy in the adversarial approach can be found in M Dubber, ‘The Criminal Trial and Legitimation of Punishment’ in Anthony Duff, Lindsay Farmer et al, *The Trial on Trial Volume 1: Truth and Due Process* (2004) 85.

defendant's criminal record', which might thus be seen as 'reluctance in the legal profession to let go of its power'.<sup>43</sup>

The entrenchment of rules and protocols as exemplars is reflected, according to Kuhn, in a tendency of an extant paradigm to marginalise both contrary observations and theoretical analysis. In the case of the adversarial paradigm, this is exemplified, as was alluded to in the previous section, in the marginalisation of Kant's views on deterrence as a valid justification for the infliction of state punishment. Kant's assessment of the validity of state-imposed general deterrence contrast strongly with the Thomistic view of deterrence as being rooted in natural law. After the Enlightenment, the doctrine of general deterrence maintains its exemplar quality (and is regarded as virtually inviolate by judges), but divine or natural rationales for its use are replaced with social science data that purports to show that deterrence works. The general deterrence exemplar is also a useful example of an adversarial exemplar that is intimately connected to a liberal economic worldview, in which individuals are regarded as being fundamentally rational agents with fairly simple motivations that can be used to control them. According to Kant:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else ... He must first of all be found to be deserving of punishment before any consideration is given of the utility of this punishment for himself or his fellow citizens.<sup>44</sup>

This position is commonly interpreted as being purely retributive in nature. However, a closer reading of the *Metaphysics of Morals*<sup>45</sup> reveals a more nuanced approach in which punishment serves two purposes. Punishment as a threat was necessary to deter crime, a tool with which civil society

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<sup>43</sup> Sward, above n 42, 62.

<sup>44</sup> Cited in Jeffire G Murphy, *Immanuel Kant The Philosophy of Right* (1970) 82.

<sup>45</sup> Immanuel Kant *The Metaphysics of Morals* (1797) in Mary Gregor (ed) *History of Philosophy Series* (1996).



could counteract individual urges to infringe the rights of others. However, when punishment is imposed, it could only be done so in a retributive way; that is, as a means of punishing the offender and not as means of deterring others as some social goal or directive.<sup>46</sup> Therefore, according to Kant, the state was morally prohibited from including an element of general deterrence in a sentence. Although there are certainly conflicting views on the moral validity of general deterrence, this Kantian reasoning still resonates in contemporary juristic debate.

The debate centres on whether it is unfair to punish an individual to set an example for others and that the only factors relevant to sentence ought to be the seriousness of the actual offence and the amount of harm or damage done and the circumstances of the particular offender involved. The Australian Law Reform Commission was of precisely that view when it conducted its review into Commonwealth sentencing law in 1988—and for that reason general deterrence is markedly missing from the list of express sentencing justifications in section 16A of the *Crimes Act 1914* (Cth), which sets out the factors relevant to sentence for federal offences.<sup>47</sup>

President Kirby, of the New South Wales Court of Appeal (as he then was), in the matter of *DPP v EL Karhani*<sup>48</sup> had to consider an appeal by the Attorney-General of a sentencing decision by a district court judge in New South Wales. The judge had handed down a sentence of three years and nine months imprisonment to a man convicted of smuggling a trafficable quantity of heroin into Australia. This happened shortly after the

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<sup>46</sup> Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution' (1989) 8 *Law and Philosophy* 151, 151. See also J Anderson, 'Reciprocity as a Justification for Retributivism (Punishment and Social Contract Theory)' (1997) 16 *Criminal Justice Ethics* 13.

<sup>47</sup> Australian Law Reform Commission, *Sentencing*, Report No 44 (1988).

<sup>48</sup> *R v El Karhani* (1990) 97 ALR 373; *R v Paull* (1990) 20 NSWLR 427, 434; *R v Sinclair* (1990) 51 A Crim R 418; *Tapper v The Queen* (1992) 111 ALR 347, 351–2; *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, (2001) 122 A Crim R 568, [93]; *Putland v The Queen* [2004] HCA 8, (2004) 218 CLR 174, [12]; *R v Fodera* [2007] NSWSC 1242, (2007) 65 ACSR 100, [7].

insertion of the new sentencing provisions into the *Crimes Act* and the first instance judge said that he could not consider issues of general deterrence in the sentence because that was not a factor prescribed in the *Crimes Act*. In rejecting this reasoning, President Kirby in his appeal judgment held that:

It would have been surprising indeed if such a fundamental principle of sentencing, inherited from the ages, had been repealed by the Act. But legislative slips can occur. It is therefore necessary to look to the language and purpose of the Act. The language of the Act gives no support for the proposition that general deterrence has been removed from the list of criteria to be considered by a court sentencing a person for a Federal offence.<sup>49</sup>

That is, to some extent, an extraordinary conclusion for His Honour to have come to, and if the sentencing justification had been anything other than general deterrence it is doubtful if he would have tried to usurp the role of the legislature and essentially rewrite the Act in that way. Nevertheless, superior courts have consistently read the general deterrence purpose into the Act despite the Commission's deliberate decision to exclude it. The Commission then recanted from this position in the later report into the sentencing of federal offenders, *Same Crime, Same Time*.<sup>50</sup>

In her wide-ranging critique of the inability of adversarialism to retain its relevance in a postmodern world, Menkel-Meadow points to a wider

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<sup>49</sup> *R v El Karhani* (1990) 97 ALR 373 per President Kirby 380.

<sup>50</sup> Australian courts have demonstrated a 'peculiar fondness' for deterrence in sentencing jurisprudence. The omission of general deterrence from the list of sentencing factors in s 16A(2) of the *Crimes Act 1914* (Cth) has caused considerable judicial disquiet:

Having regard to judicial pronouncements on the importance of general deterrence, the purposes of sentencing articulated in other jurisdictions, and opinions expressed in submissions and consultations, the ALRC agrees that general deterrence is an established and legitimate purpose in sentencing law. However, general deterrence may be applied too readily when sentencing federal offenders and it is important that judicial officers do not assume general deterrence is always an effective purpose of sentencing.

Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006).

academic dissatisfaction with its value.<sup>51</sup> She claims that despite the 'longevity and robustness of adversarialism as a mode of human discourse', even some philosophers and epistemologists have questioned its value as the best way to understand the world.<sup>52</sup> The choice of the descriptor 'mode of human discourse' is an interesting one and appears to be equivalent to what I have referred to as a juristic model in relation to the law. She points out that there are many other modes of human discourse,<sup>53</sup> some that relate to the law, some that do not. Her position is that:

the scientific method, for example, which, although it needs to 'falsify' propositions with contrary data, does not set out to prove something by juxtaposing its opposite. Additionally, conversation, storytelling, mediation and consciousness raising are all more circular and far less structured in method. Dangerous monologic (or far less adversarial) forms like inquisitions and Star Chambers also exist. Finally, there are other, completely different legal systems—civil, mediational and bureaucratic systems are examples.<sup>54</sup>

It is worth noting that tribunals within the common law systems that seek to vary or dispense with some core adversarial protections and guarantees of due process and natural justice (such as the rights to representation and to cross-examine witnesses) tend to be created by statutes that include significant limitations on how information obtained at the expense of those protections can be used. This is evidence that the farther a process is seen to deviate from the adversarial paradigm, the more

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<sup>51</sup> Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1997) 38 *William and Mary Law Review* 5, 14.

<sup>52</sup> Ibid 14.

<sup>53</sup> The exemplars of adversarial justice have siblings in the paradigms of other disciplines (outside of the law) that are intimately tied to modernity and the liberal worldview. Feminist academics have been particularly astute at identifying the common adversarial threads which infect the modern disciplines—as will be seen in section 4.4 with a brief discussion of Moulton's critique of the adversarial methods in analytical philosophy.

<sup>54</sup> Menkel-Meadow, above n 51, 14.

oversight and accountability is required to limit the potential damage suffered as a result of that deviation.<sup>55</sup>

Even those judicial officers who comment extra-judicially about the structure and future of the litigation system tend to hedge their bets and avoid overt suggestions that adversarial principles do not form the core of exemplars at the heart of the legal system. For example, Judge Ipp (writing extra-curially) is one of those who acknowledges that the adversarial system of litigation has grown and evolved organically, but does not want to imply that it is, therefore, somehow 'non-adversarial':

Our system of justice is indeed adversarial in character, but it has long progressed from the basic classical adversarial system where judges are entirely passive. By an ad hoc development of rules we now have a hybrid system based on adversarial elements. It should be recognised that our system has never been immutable.<sup>56</sup>

Adversarialism is thus seen as providing a web of paradigmatic exemplars that are entrenched at the heart of the legal system. Judges and lawyers may vary procedure, they may innovate and they may criticise. However, ultimately, if a question arises as to whether what a judge or lawyer does is valid and carried out according to law, then the answer is found by consulting what Judge Deane<sup>57</sup> referred to as 'traditional judicial procedures, remedies and methodology', which have constitutional and normative force.

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<sup>55</sup> For example, s190 of the *Crime and Misconduct Act 2001*(Qld) makes it an offence for a person to refuse to answer a question put to them by the presiding officer at a Commission hearing. The provision expressly displaces the right to silence and to legal professional privilege. S 197(2) of the Act then provides that '[t]he answer, document, thing or statement given or produced is not admissible in evidence against the individual in any civil, criminal or administrative proceeding'.

<sup>56</sup> Cited in Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th Annual AIJA Conference, Adelaide, Spring 1999) 5  
<<http://www.aija.org.au/online/mason.rtf>>.

<sup>57</sup> Deane, above n 36, 486.

#### **4.4 The Discipline of Law in the Adversarial Context— Social Order and the Wider Liberal Worldview**

Although traditional jurisprudence tends to connect the rise of the due process exemplars with a growing political and social enfranchisement of the middle class produced by the industrial revolution, and the spread of *laissez faire* liberal values and practices designed to protect mercantile and individual freedoms, later thinkers take a more critical view.

Foucault is distrustful of the traditional jurisprudence of this period that attempts to cloak changing legal and penal policies in terms of Enlightenment concerns for human, social and political rights. He traces the changes in patterns of offending in the 1600s, which were much more likely to be crimes of violence such as homicides and assaults, to a preponderance of property offences beginning in the mid 1700s. He explains this change in offending as a turn:

from a criminality of blood to a criminality of fraud, driven by a rising mode of capitalist production, increase in wealth for the class reaping the benefits of that production and a greater value placed on property relations rather than the customary deference to the local lord or priest ... The true objective of the reform movement was not so much to establish a new right to punish based on more equitable principles, as to set up a new economy of the power to punish, to assure its better distribution, so that it not be too concentrated at certain privileged points or too divided between opposing authorities.<sup>58</sup>

The new structures of the criminal justice system began to take on 'the bourgeois appearances of a class justice' to meet the needs of a developing market economy in which the relationships between people and property were in great need of regulation and protection. These are perspicacious insights from Foucault, who held that these changes were due to strategic adjustments of the mechanisms of power, rather than to incremental improvements in a general respect for human and political

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<sup>58</sup> Foucault, above n 10, 77–8.

rights. The conceptual connection with Kuhn's emphasis on the political and social worldview of practitioners is important.

This political need to protect property relationships goes a long way to explaining the intrinsic and symbiotic relationship between adversarialism, property rights and due process exemplars that developed and became constitutionally entrenched in the 19<sup>th</sup> and 20<sup>th</sup> centuries. A market economy cannot thrive without the close regulation of production, property, ownership and trade. It requires smooth and efficient processes for the transfer of ownership and the protection of property rights. It was perhaps inevitable that the markets of the Western liberal democracies were seen by jurists as a complex web of often conflicting property rights that could only be resolved and clarified by conceiving them of disputes in need of quick and determinative adjudication. This was clearly recognised by Marx as early as 1867 when he wrote that:

Commodities cannot go to market and make exchanges of their own accord. We must therefore have recourse to their guardians ... their guardians must place themselves in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other ... except by means of mutual consent. This juridical relation, which thus expresses itself in a contract, is a relation between two wills and is but a reflex of the real economic relation between the two.<sup>59</sup>

In addition to the analysis of historians, sociologists and philosophers, there has been some academic and judicial acknowledgement that the principles claimed to comprise the core of the adversarial process are a matter of historical and cultural protocol, rather than due to some rational, *a priori* and mandated design. To a large extent, it appears that the principles of adversarialism are a product of common law convenience and are in fact susceptible to paradigmatic change if the judiciary (and legal profession) are in favour of change. An early assertion that the adversarial core is a product of the court system itself comes from Blackstone:

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<sup>59</sup> Karl Marx, *Das Kapital* (Serge Levitsky trans, 2009) 47.

If therefore the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the fact and establish the truth contended for, by appealing to some mode of prohibition or trial, which the law of this country has ordained for a criterion of truth or falsehood.<sup>60</sup>

According to Underwood, this is an express acknowledgement that the common law trial has been ordained by the common law itself as the method of resolving civil disputes in a court.<sup>61</sup> Underwood goes on to make an argument, based on observations similar to those of Davies,<sup>62</sup> that the imperatives that historically drove the structure of civil procedure (such as the need for oral proceedings, a single climactic trial and litigation controlled by the parties) no longer apply in many cases and the adversarial core ought to be malleable. Underwood observes that:

the process of a modern trial is not something that has been designed, or recently redesigned, to achieve the best result for the parties in dispute. Rather, its adversarial nature and characteristics of continuity and orality have arisen from an historic scenario, that by and large no longer exists.

The received view is often that the adversarial trial persists because it is the best mechanism for finding the truth, meaning the facts that can establish which party ought to win, if we construct their interaction as a dispute. However, this view has always been a pragmatic fiction. Lord Denning famously asserted that the adversarial nature of our legal system requires that an adjudication be made, not that the truth must be discovered. An adjudication is made on the grounds of the admissible evidence, regardless of whether that evidence necessarily discloses what actually happened. Denning said:

If the plaintiff fails to prove his case—for want of any admission by the defendant—no injustice is done to him. Even though the truth may not have been ascertained, no injustice is done. In these

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<sup>60</sup> William Blackstone, *Commentaries on the Laws of England, Book III* (1983) 29.

<sup>61</sup> Chief Justice Peter Underwood (Supreme Court of Tasmania), 'The Trial Process: Does One Size Fit All?' (2006) 15 *Journal of Judicial Administration* 165.

<sup>62</sup> Davies, above n 7.

cases all that justice requires is that there should be a fair determination of the case whatever the real truth may be.<sup>63</sup>

Here Denning alludes to the fact that justice is a socially constructed concept. It has no meaning outside of a social, human context. It refers to a shared understanding of how humans ought to, ideally, interact. It is both teleological and an abstraction. In other words, justice is what we, or rather what the courts, say it is. Since our courts and legal processes have evolved (rather than designed) to operate adversarially, justice is constructed as being discoverable by adversarial processes.

This social constructivist perspective is important, as Foucault suggested, because it helps explain why a social institution such as a law court has such a claim and needs to be seen as operating pursuant to a paradigm. Constructivist philosopher John Searle explains that if the general constructivist account of social facts is correct, there may be many terms that crystallise only when the participants share certain intentional states about what they are doing. In the case of a social fact, as opposed to a natural fact, the attitude that we take towards the phenomenon is partly constitutive of the phenomenon.<sup>64</sup> A constructivist position, then, would be that the term 'court' is a feature and outcome of socio-linguistic behaviour, which only becomes apparent *a posteriori*. It would be that, far from an adversarial court being some inevitable feature of human interaction, this assumed inevitability is rather a product of our study of it. We explain the adversarial process in ways that make sense of its supposed evolution and usefulness to us.

There is significant critical literature, devoted to a critique of a wider tradition of adversarialism, which encompasses much of the liberal

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<sup>63</sup> *Air Canada v Secretary of State for Trade* (1983) 2 AC 394, 411.

<sup>64</sup> For example, Searle argues:

Part of being a cocktail party is being thought to be a cocktail party, rather than simply being in a room where oneself and others are holding glasses of alcoholic drinks. When people are interacting in a court, much of what they do is determined by a social fact, a shared construction of the room they are occupying as being 'a court'.

John Searle, *The Construction of Social Reality* (1995) 7.



academic agenda, across a number of key disciplines. According to some critical schools, the adversarial techniques of analytic philosophy that have largely defined academic discourse for a century are far from neutral and objective, and are based, rather, on an unspoken consensus among privileged practitioners who define a field and its methods. In essence, the various methods within analytical philosophy assume that complex issues, phenomena and questions can be reduced to more simple components. Logical analysis of claims and arguments lead to the assertion of various beliefs that can then be tested, and perhaps disproven or discredited by others. It seeks to arrive at truth by promoting the value of clarity, rigour and argument.<sup>65</sup>

Moulton argues, in her seminal paper 'A Paradigm of Philosophy: The Adversary Method', that this process has a different social meaning for men and women.<sup>66</sup> The adversarial method of identifying a position that can then be attacked and refuted operates 'to the advantage of those whose socialised gender identity best fits a combative practice'. Behaviour seen as appropriately assertive in men is readily seen as aggressive in women. As well as subtly reinforcing the privilege of maleness, according to this view, the adversarial paradigm impoverishes philosophical practice, excluding other more exploratory approaches that may, in some contexts, be more fruitful. She says that:

aggression normally has well deserved negative connotations ... this negative concept, when it is specifically connected to ... workers in certain professions (sales, management, law, philosophy, politics) often takes on positive associations. In these contexts, aggression is thought to be related to more positive concepts such as power, activity, ambition, authority, competence and effectiveness.<sup>67</sup>

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<sup>65</sup> See generally Scott Soames, *The Dawn of Analysis* (2<sup>nd</sup> ed, 2003) xiii–xvii; Hans-Johann Glock, *What is Analytic Philosophy?* (2008).

<sup>66</sup> Janice Moulton, 'A Paradigm of Philosophy: The Adversary Method' in SG Harding and MP Hintikka (eds) *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, Philosophy of Science* (2<sup>nd</sup> ed, 2003).

<sup>67</sup> Ibid 149.

Moulton contrasts<sup>68</sup> the views of Popper and Kuhn in much the same way as this thesis did in Chapter 2. That is, to contrast Poppers view that a discipline progresses through a process of induction (where a theory is set up to hypothesis that all As are Bs and then to look for counterexamples that would falsify the theory) with Kuhn's view that theories are not falsified, they change in reaction to changes in paradigms and worldviews that are not solely based on induction but a recognition that the questions that can be answered by the new paradigm are of more intense interest to practitioners.

Moulton engages in a compelling critique of the contemporary methods of analytical philosophy, from a feminist perspective, beginning with the assumption that it operates pursuant to a Kuhnian paradigm. In doing so, Moulton goes beyond the more familiar assertion that there is a socially constructed belief that aggression is a non-feminine quality that is a burden for women in professions such as philosophy and law. Her main concern is to explain why compliance with exemplars of the adversary method in philosophy actually limits and distorts the work of philosophers. If the adversarial techniques of pure induction are paradigmatic exemplars, rather than just one of the methods available within the wider disciplinary matrix, then other ways of analysing the more intractable problems of philosophy are not taken seriously by the disciplinary mainstream and the history of philosophy itself is distorted.

Moulton's articulation of the adversarial paradigm that informs the method of academic philosophers is both insightful and valuable in the sense that it articulates a context in which both philosophical method and juristic method can be seen as expressions of very similar worldviews and ideologies. Her comparison is neither contrived nor abstract. There are profoundly important reasons why the work of an analytical philosopher and the work of an adversarial lawyer are so strikingly similar (at least in terms of the core methods of reasoning). These reasons have to do with

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<sup>68</sup> Ibid 152.

an intellectual preoccupation with a particular conception of objectivity as the guarantee of truth—and a belief that the truth thus generated is intrinsically valuable, unassailable and exclusive.<sup>69</sup>

## 4.5 Conclusion

The quality of exclusivity is what truly marks a set of exemplars as paradigmatic. In the trend of some Australian courts (discussed above) to describe therapeutic process not as non-adversarial but as less adversarial, there is no explicit challenge to the exclusivity or primacy of adversarial exemplars. We see a neat parallel to the debate about how dominant adversarialism ought to be in the law in Moulton's articulation of her real concern about adversarialism in her own field:

My objection to the Adversary method [in philosophy] is to its role as a paradigm. If it were merely one procedure among many for philosophers to employ, there might be nothing worth objecting to except the conditions of hostility are not likely to elicit the best reasoning. But when it dominates the methodology and evaluation of philosophy, it restricts and misrepresents what philosophic reasoning is.

She then concedes that criticism of a paradigm, however warranted, will not succeed in replacing that extant paradigm unless there is an alternative paradigm ready to replace it. However, in the case of philosophy, Moulton argues, non-adversarial reasoning exists both within and outside the discipline, yet the current paradigm does not recognise it.

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<sup>69</sup> It is beyond the scope of the thesis to give a detailed exposition or defence of this view, but the links are reasonably clear and explicable. The analytical school in philosophy seeks to reduce statements about the world, as far as possible, to an analytic rather than synthetic form. An analytic proposition is one in which the subject contains the predicate—such as 'a tall man is a man' or 'an equilateral triangle is a triangle'. Synthetic propositions can only be supported by experience and observation—such as 'it rained yesterday' or 'recidivism among drug addicted offenders is high'. Similarly, there is a long tradition in law of trying to reduce, or classify, synthetic statements to analytic form. The decision of a jury, for example, is clearly a subjective belief about synthetic assertions, but that decision is given the status of fact that is legally enforceable.

Moulton's insight is consistent with the Kuhnian view that data, methods and reasoning that are not the products of exemplars within the current, predominant paradigm are marginalised and seen as either simple statistical anomalies or to be worked on outside of the discipline.

As discussed in Chapter 2, Kuhn was fascinated with the appearance of professional and conceptual order within the natural sciences.<sup>70</sup> Much of the analysis of the adversarial system undertaken in this chapter has highlighted the fact that the law, much like the hard sciences, is an inherently conservative discipline that places a dogmatic emphasis on just this sort of professional and conceptual order. If we accept that legal practitioners, judges and scholars act as if the existing set of adversarial exemplars provide an adequate resource for solving all the puzzles that the operation of the legal system throws up, then the conclusion is that they, by-and-large, trust that there is an extant juristic model and, therefore, an extant paradigm, and that it works. The next chapter considers whether therapeutic jurisprudence could constitute, or be part of, an alternate, paradigm-based juristic model.

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<sup>70</sup> For a detailed discussion of that fascination, see BTS Barnes, *Kuhn and Social Science* (1982).

# Chapter 5

## Therapeutic Jurisprudence as a Paradigm

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### 5.1 Introduction

Advocating for, foreshadowing or recommending a paradigm shift is to assert that a replacement candidate paradigm exists. The rhetoric of those who attempt to articulate a vision of particular legal processes and domains based on non-adjudicative models is steeped in the language of Kuhn.<sup>1</sup> As was suggested in chapters 1 and 2, this use of Kuhnian terminology and concepts can be explained, to some degree, as being

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<sup>1</sup> Examples include Arie Freiberg, 'Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms' (2011) 8(1) *European Journal of Criminology* 82; Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2003) 20(2) *Law in Context* 6; Alison Macdonald, 'Towards a Paradigm Shift: Spanning the Divide' (2009) 22(10) *Parity* (Melbourne) 20; Andrea Cotter-Moroz, 'Compulsory Mediation: Prepared for the Paradigm Shift?' (Paper presented at the National Mediation Conference Australia, Perth, 2008); Bill Richardson, 'A Paradigm Shift in Patent Law?' (2006) 158 *Managing Intellectual Property* 43; Nigel Stobbs, 'How to be Selfish and Political Without Really Trying: Time for a Paradigm Shift in the Resolution of Disputes Within Queensland's Not-for-Profit Associations' (2005) 5(2) *Queensland University Of Technology Law And Justice Journal* 160; James Goudkamp, 'Paradigm Shift in the Cost of Accidents: Review of the Law of Negligence' (2003) (60) *Plaintiff* 39; Peter McMahon, 'The Politics of Paradigm Shift' (2003) 75(1) *Journal of Contemporary Analysis* 22; George Zdenkowski, 'Limiting Sentencing Discretion: Has There Been a Paradigm Shift?' (2008) 12(1) *Current Issues In Criminal Justice* 58.

motivated by the 'thrill of revisionism', rather than by any perceived need for academic or intellectual rigour. However, for therapeutic jurisprudence to constitute a paradigm, whether of a whole juristic model or just of some subset of legal thought and practice, in anything but a colloquial sense, there must be evidence that it displays the necessary qualities of a Kuhnian paradigm. If therapeutic jurisprudence is part of a posited wider therapeutic (or non-adversarial or post-adversarial) paradigm, then they too must possess these qualities.

In Chapter 4, the discussion as to whether adversarialism constituted a paradigm of a juristic model focused on the history of the adversarial system and whether an evolution from a pre-paradigmatic phase to a period of normal science could be identified, whether there was evidence of the emergence and institutionalisation of a set of discrete disciplinary exemplars and whether practitioner acceptance of adversarialism could be identified and explained by linking it to a wider cultural and political worldview.

The question of whether the therapeutic approach to law constitutes, or may constitute, a paradigm needs to be examined according to a somewhat different emphasis, although the criteria outlined in the previous paragraph are still relevant. This is simply because the therapeutic paradigm, if it exists, is not the currently accepted paradigm. It is not developing within a field that is currently in a pre-paradigm phase. Thus, an identifiable set of potential exemplars is necessary, as is the political and cultural context of disciplinary acceptance, but it would also need to satisfy the qualities that Kuhn says characterise a paradigm that is emerging as a reaction to disciplinary crisis, precipitated by a set of intractable problems. The work of practitioners and academics within the field needs to be examined to determine whether they are exhibiting the sorts of attitudes characteristic of a period of crisis. Kuhn says that:

Confronted with anomaly or crisis, scientists take a different attitude toward existing paradigms, and the nature of their research changes accordingly. The proliferation of competing articulations, the willingness to try anything, the expression of

explicit discontent, the recourse to philosophy and debate over fundamentals, all these are symptoms of a transition from normal to extraordinary research.<sup>2</sup>

Certainly, a candidate for paradigm status must advocate an identifiable and evolving set of disciplinary exemplars against which potential practices and rules within the discipline can be benchmarked for validity. The candidate must also attract a critical mass of disciplinary acceptance. Those criteria will be touched on in this chapter.<sup>3</sup> However, the key quality required in order to be seen as an alternative paradigm, *qua* alternative, is that it must promise to solve (rather than just identify or assert) intractable problems within the discipline. If it does not, then it is only an alternative in the sense that it replicates the set of current exemplars in different language—what Freiberg describes as ‘pragmatic incrementalism’.<sup>4</sup> It need not promise to be a panacea, a complete theoretical framework for the discipline or a self-contained disciplinary matrix. However, it must promise to succeed where the current paradigm fails. If therapeutic jurisprudence does this, then the key issue of incommensurability between adversarialism and therapeutic jurisprudence arises (and is dealt with in Chapter 6).

Kuhn claims that there have been many scientific revolutions (paradigm shifts) and some have occurred in quite specialised sub-subfields within a given discipline—some with as few as 25 practitioners as members.<sup>5</sup> We

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<sup>2</sup> SSR 90–1. We ought not, however, to conclude that the existence of these attitudes necessarily indicates that a discipline is undergoing a paradigm shift. That is a different question, and one that is expressly addressed in Chapter 6 of the thesis.

<sup>3</sup> As will become clear in the analysis below, it is relatively easy to find evidence for these criteria, but the more potent question is whether these attitudes and exemplars are indicative of a separate (existing or emerging) paradigm, rather than just evidence of disciplinary crisis *simpliciter*.

<sup>4</sup> Freiberg, above n 1, 8.

<sup>5</sup> SSR postscript 177, 178. Kuhn refers to subgroups of disciplines in this regard, such as the broad discipline of chemistry, which contains the subgroup of organic chemists and the further sub-subgroup of protein chemists. He discusses the increasingly important role of informal communications as the subgroups become more specialised. Attendance

can conceive of therapeutic jurisprudence as a range of paradigm-based subfields.<sup>6</sup> It could, conversely, be conceived of as something far less influential or coherent than a paradigm. However, regardless of how broad or narrow the conception, the process of juxtaposing and contrasting therapeutic jurisprudence (as a potential paradigm of either the legal system or of some subfield) with the adversarial paradigm still does the key work of the thesis in highlighting potential incommensurability. The importance of commensurability is that it delineates, explains and predicts the future relationship between two contexts, schools or communities within a discipline.<sup>7</sup>

It also allows practitioners to precisely delineate the issues on which they disagree, or upon which they are unable to make use of a neutral, common language to debate their views.<sup>8</sup> As discussed in Chapter 1, the conceptual relationship between therapeutic jurisprudence and adversarialism is currently murky (and fraught with political and ideological

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at small, specialised conferences, the pre-distribution of papers and the existence of what we would now see as intimate email discussion lists, Facebook and other social media groups shared by members. All these are seen to thrive as fora for communication between therapeutic jurisprudence scholars and practitioners. Indeed, this thesis could probably not have been written without the work of those networks in therapeutic jurisprudence.

<sup>6</sup> In fact, there seems to be little point, as this thesis contends, in advocating that therapeutic jurisprudence adopt the role of a paradigm of the whole legal system.

<sup>7</sup> At SSR 112 Kuhn explains that at times of disciplinary revolution, practitioners' perception of their environment must be 're-educated'—they must learn a new gestalt. This is so they can recognise that some old problems in the discipline are no longer really questions for that discipline at all—and that some questions that were once thought to be trivial or marginal within the discipline are now at its core.

<sup>8</sup> The suggestion being that it is very worthwhile for those who adopt contrary positions to know which of those issues on which they differ are fundamental. In other words, on which issues they will just have to 'agree to differ'. Academic debates are generally of this nature, that is, a tension between contrary positions where both positions may be wrong, but both cannot be correct. Contradictory debates, in which both contending positions cannot be wrong, are relatively rare.



undercurrents) and that may cause confusion within the project in regards to mainstream therapeutic techniques and principles.<sup>9</sup>

The breadth of the incommensurability that fully manifests may not be precisely known for a long time, if ever. From the position of the outside observer, and even from that of the contemporary practitioner, some changes in paradigm exemplars can appear to be just cumulative developments of the existing paradigm.<sup>10</sup> There is a tendency to characterise particular therapeutic jurisprudence innovations in this way within some of the relevant literature (such as the less adversarial proceedings initiative in the Family Court of Australia, discussed in Chapter 4). However, even if therapeutic jurisprudence operates to insert some rules or exemplars within the core of the existing legal disciplinary matrix, it will have succeeded in effecting paradigmatic change (albeit by modifying the existing paradigm rather than by replacing it).<sup>11</sup> Some fields (and law is almost certainly one of them) contain so many sub-disciplines of specialist study and practice that paradigm change within some of them is inevitable, according to Kuhn.<sup>12</sup>

Thus, the objective of this chapter is to evaluate the current dynamics and status of the therapeutic jurisprudent movement to ascertain whether it is, itself, a potential paradigm (of either a whole juristic model or of at least one component part), or an integral part of a larger (non-adversarial) paradigm—or neither. The conclusion will be that therapeutic

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<sup>9</sup> Nigel Stobbs, 'The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' (2011) 4(1) *Washington University Jurisprudence Review* 97.

<sup>10</sup> SSR 52.

<sup>11</sup> Because as we have seen in Chapter 2, the core of exemplars within the disciplinary matrix is what articulates the paradigm. A paradigm that is amended in this way may not even be recognised as having undergone fundamental change. It could be argued that this reality is why there is so much reference in the literature to concepts such as 'post-adversarial' and 'non-adversarial' systems—systems that are, as yet, largely defined by what it is they are opposed to.

<sup>12</sup> SSR 37.

jurisprudence can be legitimately conceived of as paradigmatic, in either of those senses, but that there is little evidence that the therapeutic jurisprudence movement aspires to fund an entire juristic model in the way that adversarialism does. Integral to this evaluation will be some consideration of criticism and contrary opinion levelled against the therapeutic jurisprudence movement, but the depth and effect of that criticism will be more sharply examined in the Chapter 6 discussion of incommensurability.<sup>13</sup>

## 5.2 The Ontological Issue—Paradigmatic of What?

In this section I deal with the issue of what therapeutic jurisprudence *is*, in the Kuhnian context. I examine the various ways in which therapeutic jurisprudence can be *conceived of* as being paradigmatic. Then, in the following sections, I consider whether, in fact, *it is* paradigmatic. This first question is largely one of ontology,<sup>14</sup> and it is necessary to deal with it before discussing, in the following section 5.3, whether this goes beyond conception to reality. To this end, I shall consider three ontological positions in relation to therapeutic jurisprudence:

- **First**, (at 5.2.2) I consider whether therapeutic jurisprudence can be conceived of as paradigmatic in the sense that it could comprise a discrete juristic model (of the kind discussed in Chapter 3).
- **Second**, (at 5.2.3) I consider whether it can be posited as part of some larger therapeutic (or post-adversarial) paradigm that is, itself, paradigmatic of a discrete juristic model.

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<sup>13</sup> This is because the criticism is best seen, for the purposes of this thesis, as resistance to therapeutic jurisprudence acquiring any paradigmatic status in its relationship with adversarialism. The bulk of therapeutic jurisprudence critique comes from (but is not confined to) adversarially committed members of the judiciary.

<sup>14</sup> The subject of *ontology* is the study of the *categories* of things that exist or may exist in some domain or field. The product of such a study, called *an ontology*, is a catalogue of the types of things that are *assumed to exist* in that particular domain of interest or field.

- **Third**, (at 5.2.4) I consider whether it may be paradigmatic of a ‘problem-solving’ approach to just some particular forms of legal work.

If the answer to any of these questions is ‘yes’, then the exercise of testing any of these potential paradigms for incommensurability with the adversarial paradigm is justified and of value.<sup>15</sup>

### 5.2.1 How Does Therapeutic Jurisprudence See Itself?

In considering the level at which therapeutic jurisprudence can be conceived of as paradigmatic it is obviously important to consider how those within the therapeutic jurisprudence community view their work and research. It is also necessary to examine how its critics perceive it and how the movement reacts to these critics. This is no easy undertaking because there is a range of views both within the ranks of its adherents and within the positions of individual practitioners over time. The identity of therapeutic jurisprudence is both fluid and reactive. Both the extant literature and the ongoing work of therapeutic jurisprudence practitioners demonstrate views consistent with all three ontological categories listed above.

Therapeutic jurisprudence makes synthetic rather than analytic assertions about law.<sup>16</sup> That is to say that whether its assertions are true or not will be determined by how their meaning relates to the world rather than purely by virtue of their meaning. The justification of its assertions will depend on experience and observation. They are no more *a priori* than the equivalent assertions of adversarialism. They are testable and must be tested in order to determine their validity. For example, the assertion that something is therapeutic is akin to the assertion that something is just. We cannot

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<sup>15</sup> If therapeutic jurisprudence proves to be not just conceived of in any of these ways, but manifests itself as an extant competitor to the adversarial equivalent, then that exercise becomes even more useful and urgent.

<sup>16</sup> Interestingly, this tendency to make synthetic observations and assertions places therapeutic jurisprudence more within the social sciences arena than the humanities.

work out what therapeutic or justice mean simply by consulting a dictionary; we need to examine and assess the social functions of these concepts or values. Practitioners and advocates who manifest these purportedly therapeutic concepts and processes must construct, and then point to, definitions of these concepts to justify what it is they do in their name. Then, in order to have any real utility, they must be capable of being used to justify some conduct and to criticise or question other conduct.<sup>17</sup> In the case of therapeutic jurisprudence, the claim is consistently made that it can be used to critically assess legal rules, roles and players in order to improve them. If we assert that a certain legal rule ought to be amended or repealed because it is unjust, then we need a definition of justice that explains why this is so. Similarly, if we promote a rule or practice on the grounds that it is therapeutic (or less anti-therapeutic), then we need a definition of therapeutic that explains why this is so.

The meaning of the concept might be variable in practice (between professional or cultural groups), but this does not condemn it to a futile relativism or pluralist status. Even where opinions differ as to what might count as anti-therapeutic in a particular situation (for example), what unites practitioners in the field is the belief that there is something that is properly so-called anti-therapeutic.

As Kuhn suggests in SSR, asking what a theory 'is' may be a somewhat contrived undertaking, given that a theory is not static. It evolves, according to Kuhn and most other philosophers of science, into whatever its proponents and advocates want it to do and be, and into what the members of the wider discipline will allow it to be. This observation, that the ambit of a theory is delineated by what the members of the discipline will allow it to be, is crucial. Kuhn says:

Though the strength of group commitment varies, with nontrivial consequences, along the spectrum for heuristic to ontological

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<sup>17</sup> This central claim is initially explored in detail in Bruce Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy and the Law* 184.

models,<sup>18</sup> all models have similar functions ... they are held up to determine what will be accepted as an explanation and as a puzzle-solution.<sup>19</sup>

Over the past two decades, the therapeutic jurisprudence community has proposed a variety of explanations for what therapeutic jurisprudence is, what it is not and what its core methodology should be. These explanations do, indeed, spread across both heuristic and ontological contexts. This is an understandable dynamic, given that therapeutic jurisprudence has been both an attempt to describe processes that are already happening in courts and legal practice, and also a normative agenda (that is, an effort to prescribe what *ought* to happen). A number of therapeutic jurisprudence advocates would prefer it to be conceived of as, primarily, a set of procedural guidelines, protocols and techniques for making the justice system more user-friendly in quite specific ways.<sup>20</sup> However, to pretend it is not reflective of at least some deeper beliefs about the role of the wider legal system in a civil society, as will be argued below, seems counterintuitive.

Despite the fact that some researchers expressly refer to therapeutic jurisprudence as a paradigm, and do so to propose it as a clear alternative to an adversarial paradigm, advocates, analysts and critics of therapeutic jurisprudence accord it differing status. Some see it as a unique and

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<sup>18</sup> Kuhn is saying here that a theory or model can be just a set of problem solving techniques based on experience (a heuristic) or a complete ontology (an explanation for how a whole field or discipline works). The latter, ontological sort of theory, is close to what I refer to as a 'juristic model' in Chapter 3.

<sup>19</sup> SSR 184.

<sup>20</sup> The number of handbooks, bench books, practitioner guides and operations manuals based directly on therapeutic jurisprudence work is significant and impressive. It cannot be denied that the drive to eradicate anti-therapeutic effects and consequences from many areas of legal practice demonstrates substantial practical benefit. See, eg, Michael King, 'Solution-Focused Judging Bench Book' (2009) *Australasian Institute of Judicial Administration*.

identifiable movement,<sup>21</sup> some see it as a lens or vector within a wider movement,<sup>22</sup> while others seem to afford it a much narrower ambit. We have seen Freiberg and others describe it as an alternative paradigm to adversarialism, and Wexler early on emphasised the need for therapeutic jurisprudence practitioners to undertake more macro-analytical research.<sup>23</sup>

Some voices of caution, such as Freckelton, have called for restraint in over-emphasising the ambit of therapeutic jurisprudence and of treating it as a panacea.<sup>24</sup> There is even an express reluctance to allow it to be thought of, or written of, as a theory. As has been suggested in previous chapters, there is little or no attempt by Freckelton or others to tease out what it is about therapeutic jurisprudence that precludes it from the status of theory. It seems likely that this assertion is motivated more by a concern that therapeutic jurisprudence not be hijacked by the jurisprudential fringe nor marginalised in the ways that the 'law and' movements of the 1960s and 1970s were. In fact, it is usually in response to critics of therapeutic jurisprudence, who rarely base their criticisms on theoretical grounds, that this reluctance is expressed.

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<sup>21</sup> Wexler occasionally uses this label when referring to those who contribute to therapeutic jurisprudence scholarship and practice. He describes one of his recent essays as exploring 'the therapeutic jurisprudence movement from theory to practice and the role of lawyers and judges as therapeutic agents.' David Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17.

<sup>22</sup> Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2006) 6(1) *Pepperdine Dispute Resolution Law Journal*.

<sup>23</sup> David Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1(1) *Psychology, Public Policy and Law* 222.

<sup>24</sup> There are no explicit arguments that would deny therapeutic jurisprudence paradigm status in the literature; most critics are more concerned with pragmatic and legal/constitutional issues rather than ontological or epistemic status. See, eg, James Duffy, 'Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, is Three a Crowd?' (2011) *Melbourne University Law Review* 394.

King, Freiberg et al have asserted, in response to criticisms of the alleged vagueness of the definitions and normative positions of the movement, that therapeutic jurisprudence:

is rather modest in its goals. It is not a theory. It is not presented as a defence or indeed a critique of the justice system or society generally—those seeking a radical approach to the law should seek elsewhere. It is not an approach to radically restructuring the legal system or society. It is not a new-age movement or a cult. It is not presented as a unitary, coherent body of knowledge or approach to judicial or legal practice.<sup>25</sup>

Although a paradigm is rarely any of these phenomena referred to by King, Freiberg et al, the implied warning off of legal theorists and those seeking broader legal and social reform it contains is telling. The delineation of what constitutes a therapeutic jurisprudence practitioner implied in this analysis tells the world, and the professions, what it means to be part of this movement.

Co-founder of therapeutic jurisprudence, David Wexler, gave the first significant definition of the nature and scope of therapeutic jurisprudence in a 1992 paper written to propose a new, interdisciplinary approach to mental health law in the US. At that time, he wrote that:

[t]herapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behavior of legal actors (lawyers and judges). In other words, one may look at the law itself as being a therapist—or at least a therapeutic agent or tool.

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<sup>25</sup> Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (2009) 32. This urging of prospective 'radicals' to look elsewhere is a particularly revealing turn of phrase, possibly indicating both a Kuhnian sense of ownership over the movement by key practitioners (whose views and values are highly likely to be absorbed and reproduced by their students)—and a sensitivity to broad-based criticism. Apart from some fairly isolated expressions of concern from more conservative members of the North American judiciary (discussed later in this chapter), there is scant evidence in the literature that therapeutic jurisprudence is considered to be (for example) cult-like or a new-age movement.

Likewise, like iatrogenic disease in medicine,<sup>26</sup> the law may itself produce psychological suffering ('law-related psychological dysfunction' or 'juridical psychopathology'). The task of therapeutic jurisprudence is to identify—and ultimately to examine empirically, relationships between legal arrangements and therapeutic outcomes.<sup>27</sup>

It is worth considering whether this foundational statement of the task of therapeutic jurisprudence constitutes what Freiberg, King et al referred to as a 'modest' goal. As to whether therapeutic jurisprudence is in any way a theoretical undertaking (which Freiberg, King et al deny) needs to be assessed in light of the way in which Wexler finishes the setting of the agenda above when he declares that:

[t]he research task is a cooperative and thoroughly interdisciplinary one (potentially involving law, philosophy, psychiatry, psychology, social work, criminal justice, public health, and other fields). Such research should then usefully inform policy determinations regarding law reform.<sup>28</sup>

Wexler has been the leading figure and advocate for the expansion of therapeutic principles and practices in law ever since.<sup>29</sup> Wexler has said that his interest in expanding outwards from his work in the mental health jurisdiction was to some extent inspired by Perlin's efforts to keep the scholarship of constitutional rights in criminal procedure alive at a time when the composition of the US Supreme Court changed to a more conservative mix. Perlin was part of a movement that attempted to 'pin new, liberal, far-reaching constitutional rights on state constitutional provisions' to compensate for the lack of interest and scholarship at a federal level. Wexler believed that the emerging field of scholarship based on a collaboration of law and social science researchers and practitioners

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<sup>26</sup> This means an unintended adverse condition in a patient resulting from treatment by a physician or surgeon.

<sup>27</sup> David Wexler, 'Putting Mental Health into Mental Health Law' (1992) 16(1) *Law and Human Behaviour* 27, 32.

<sup>28</sup> Ibid 32.

<sup>29</sup> See ibid 33. See also Michael Perlin, 'State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?' (1987) 20 *Loyola Law Review* 1249.



might wither on the vine unless there was a concerted effort to publish and to pursue the agenda.

Wexler, and the other key figures in the area, have also continued to grapple with how to characterise therapeutic jurisprudence in terms of its precise place and function within legal theory and legal practice. The seminal definition Wexler first articulated (extracted above) suggests that the law can be conceived of as a therapeutic agent, in addition to whatever other qualities and functions it has. At first blush, it seems to graft this purported therapeutic quality onto the more traditional juristic properties rather than to seek to supplant any of them. If the subsequent construct has components that are conceptually symbiotic, in the sense that one cannot exist (in a normative sense) without the other, then this might be consistent with a conception of therapeutic jurisprudence as comprising a juristic model.<sup>30</sup>

In perhaps his most recent significant consideration of the ontological issue, Wexler begins by asserting that:

In actuality, therapeutic jurisprudence is not and has never pretended to be a *full-blown* (my emphasis) theory. More properly and more modestly<sup>31</sup>, it is simply a 'field of inquiry'—in essence a research agenda ... From the beginning, however, TJ has sought to work with frameworks or heuristics to organise and guide thought.<sup>32</sup>

A 'field of inquiry', a 'research agenda' and an evaluative process that informs 'heuristics' are all readily consistent with the sorts of scientific entities that Kuhn allowed could be referable to a particular paradigm.

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<sup>30</sup> In the sense that the model could not exist without the therapeutic function/effects. In this sense, the therapeutic jurisprudence phenomena are not unique in the paradigmatic core of the disciplinary matrix, but they nevertheless conceptually reside there.

<sup>31</sup> Those familiar with Wexler's scholarship would be aware of his characteristic modesty and humility. It could be that a little of this humility colours his view of the conceptual scope of TJ.

<sup>32</sup> David Wexler, 'From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part' (2011) 10–12 *Arizona Legal Studies* 1.

In a much earlier, but influential, paper, Wexler acknowledged that the interdisciplinary nature of therapeutic jurisprudence lent itself to micro-analytical application.<sup>33</sup> However, he also made some strong arguments for a significant macro-analytical context. He foreshadowed a discourse in which scholars within the field would begin examining law's therapeutic effect on society, or on particular social groups, and at clusters of decisions and of general legal doctrines. He expressly allowed that researchers might well use therapeutic jurisprudence as a method of critiquing the 'roots of the law' and to use such critique to inform calls for 'fundamental, transformative societal change'.<sup>34</sup> He further notes that the typical questions about the validity of the therapeutic jurisprudence agenda at the micro-analytical level would rear their heads in the wider theoretical domain—namely, questions relating to the due process/interventionist dichotomy, questions about a standard empirical method and questions about scope.<sup>35</sup>

There is, then, some interesting ontological drift in Wexler's articulations of the nature and scope of therapeutic jurisprudence. His conception seems to expand and contract between two key identifiable parameters: 'to identify—and ultimately to examine empirically, relationships between legal arrangements and therapeutic outcomes' and to critique the 'roots of the law' and to inform calls for 'fundamental, transformative societal change'. Research and innovations clustered around the first of these parameters are easy to identify; they are prolific. Work with direct links to the broader parameter is not so common. This drift and diversity is, to some extent, reflected in the general body of therapeutic jurisprudence scholarship.

On the one hand, some fear that if therapeutic jurisprudence is not seen as something more than a filter or lens that can be used to comment on

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<sup>33</sup> Wexler, above n 23, 222.

<sup>34</sup> Ibid 230.

<sup>35</sup> Ibid.

the therapeutic value of a law or procedure, then it might be consigned to relative obscurity—its products may be seen as little more than ‘books of handy hints’ (the contents of which are not even based upon express links with social science data so much as practitioner experience and anecdotes).<sup>36</sup> Conversely, some see it as forming part of a wider agenda, and that membership of that agenda is what will best promote its longevity and continued relevance.<sup>37</sup> Given that therapeutic jurisprudence is a fluid and user-constructed (synthetic) phenomenon, decisions can obviously be made by those who develop them, about what they are and what they become. The ontological question is, itself, fluid.

In considering whether therapeutic jurisprudence and other vectors of what she refers to as the ‘Comprehensive Law Movement’<sup>38</sup> ought to be subject to integration (meaning that all lawyers ought to be trained in them), or specialisation (meaning that only some lawyers ought to be trained in them) or some hybrid process (in which all lawyers and judges are trained in them but then choose to work in the mainstream or specialist practices), Daicoff concludes that the hybrid process is the most likely, given the current level of penetration of these vectors within both law schools and within the legal profession. She claims that:

[w]hile the integration/specialisation question remains open, the hybrid approach appears to be most likely, where most lawyers and judges are aware of the various comprehensive law vectors, but only a few choose to practice or adjudicate in those ways ... most importantly, therapeutic jurisprudence and the other comprehensive law vectors should be recast as simply ‘best lawyering practices’, excellent leading advising, or ‘leadership’.<sup>39</sup>

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<sup>36</sup> Donald Farole, N Puffett, M Rempel and F Byrne, ‘Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts’ (2005) 28 *Justice System Journal* 57.

<sup>37</sup> Whether it is in fact best conceived of in this way is the focus of 5.2.4.

<sup>38</sup> We should also note the important claim by Wexler that what Daicoff refers to as the Comprehensive Law Movement largely equates to what Australian therapeutic jurisprudence advocates call ‘non-adversarial justice’. King, Freiberg, et al, above n 25, v.

<sup>39</sup> Susan Daicoff, ‘Growing Pains: The Integration vs Specialisation Question for Therapeutic Jurisprudence and Other Comprehensive Law Approaches’ (2008) 30 *Jefferson Law Review* 551, 556, 572.

'Best practice' in the sense meant by Daicoff is very close to what Kuhn would consider to be an exemplar. On a more restrained note, Freckelton suggests that:

in the maturation phase of therapeutic jurisprudence those who identify its advantages have an intellectual responsibility to be clear about the parameters and limits of therapeutic jurisprudence. This will reduce its invocation in ways that will bring it into disrepute and result in outcomes inconsistent with its values. In addition, with its successes comes an obligation to explore what is claimed to be its implementation in practice and to evaluate rigorously whether such implementation is achieving the desired goals.<sup>40</sup>

It appears then that there is no complete consensus within the therapeutic jurisprudence community itself about absolutely excluding any of the three conceptions of therapeutic jurisprudence posited at the beginning of this chapter. Although there is certainly some ontological drift to be found in the work of its lead proponents, we can, however, detect a greater preference for a more restrained and focused ambit. I turn now, over the next three sections of the chapter, to my own analysis of the relative viability of the three ontological states.

### **5.2.2 Therapeutic Jurisprudence as a Distinct Juristic Model**

If we accept the assertions of Campbell, Aubert, Cotterre and other scholars (canvassed in Chapter 3) that juristic thought and legal discourse or practice *can* constitute distinct paradigms in the Kuhnian tradition, then it is reasonable to ask whether the therapeutic jurisprudence conception/model of the law also constitutes such a paradigm.<sup>41</sup> A juristic model, as previously explained, is a theoretical framework (governed by paradigmatic exemplars) on which the processes of civil and criminal litigation in common law courts are scaffolded.

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<sup>40</sup> Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risk of Influence' (2008) 30 *Jefferson Law Review* 575, 576.

<sup>41</sup> Or is capable of constituting a paradigm.

Those processes (which have a common theoretical basis) could include such things as legal and judicial reasoning, legal and judicial methodology, legal and judicial techniques, criminal and civil procedure, legal and judicial ethics and the rules and protocols for professional interactions between legal players.<sup>42</sup> In Chapter 4, it was argued that there is an adversarial paradigm that developed disciplinary exemplars to inform and ground our current juristic model. This section considers whether therapeutic jurisprudence could develop into the paradigm for a different juristic model.<sup>43</sup>

In Chapter 2, the argument was advanced that a shift in the paradigm that defines a juristic model does not need to appear as a root-and-branch reconceptualising of the discipline. It could manifest as just a shift in basic focus that occurs, as a result of practitioner acceptance, mind-set and worldview, over a long period. It could be as general as a shift from the law being fundamentally concerned with refereeing a dispute between parties to decide a winner based on accepted procedural rules to being primarily a social force, enhancing or inhibiting therapeutic outcomes, where the formal legal rules become less determinative of the integrity of process, and where the therapeutic rules must be adhered to in order to guarantee integrity of process.

Provided that this general shift in focus also provided a set of accepted exemplars for, *inter alia*, measuring therapeutic outcomes, then therapeutic jurisprudence could be conceived of as a juristic model. It is important to reiterate here that a juristic model neither encompasses nor proscribes a complete system of rules and practices untied by a coherent

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<sup>42</sup> Judges, lawyers, clients and all those whom the law requires to be involved in any sort of legal proceeding.

<sup>43</sup> It is important to acknowledge the organic nature of paradigms. Adversarialism did not arrive as a complete and wholly consistent conceptual or practical package. Neither did therapeutic jurisprudence.

underlying narrative<sup>44</sup>—in the sense that a change in models would entail the sort of ‘radical restructuring of the legal system or society’ that King and Freiberg are so wary of.<sup>45</sup> Neither does the Kuhnian agenda in general lend itself well to considerations of grand narratives.

Traditional jurisprudence, deeply steeped in the ethos of modernity from which it so intimately evolved, has always proposed theories that construct the law as a contiguous and objectively discoverable set of rules, principles, doctrines and expressions of authority that exist to justify and implement that authority. Even so trite an expression as ‘the Rule of Law’ is primarily a political utterance that places law at the centre of governance and polity. Jurisprudence has traditionally sought to draw together these identified rules, doctrines and principles into a coherent thread as if they were based on an underlying ur-text or some metanarrative of what is legitimate. Although certainly not a postmodern theorist,<sup>46</sup> Kuhn has no interest in clinging to the notion of the lawyer as simply a skilled technician applying a set of continually refined rules and practices heading towards some ever more effective and efficient manifestation of legitimate authority.

Assertions that therapeutic jurisprudence can provide some sort of underlying and comprehensive narrative are virtually non-existent in the

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<sup>44</sup> If we grant that adversarialism is the paradigm for our current juristic model then there is no comprehensive set of adversarial rules that cover all elements of legal work and practice. The adversarial rules that do exist inform and limit all rules within the model, however.

<sup>45</sup> See Duffy, above n 24.

<sup>46</sup> Douzinas, Warrington and McVeigh, in a significant work on grand narratives in jurisprudence, point out that modernist constructions of the law now contend with other metaphoric descriptions of Law as a ‘game, a genre of rhetoric derived from a culture of argument, a form of semiotics, or a social mechanism for dispute resolution best studied by way of anthropology’. Some scholars, they note, ‘even envision the study and practice of law as a literary activity by focusing on the central role of textual interpretation in the everyday work of lawyers’: Costas Douzinas, Ronni Warrington and Susan McVeigh, *Postmodern Jurisprudence: The Law of Texts in the Texts of the Law* (1991).

literature. Even where practitioners or academics do advocate for such a wider conception, they recognise that there is likely to be resistance from the more conservative elements within the movement. Satin, in a somewhat notorious publication, expressly asks Wexler and Freckelton if their insistence on making relatively modest claims about the potential ambit of therapeutic jurisprudence are grounded more in attempts not to alienate ‘the adversarial-rights-obsessed legal profession at the heavy cost of muting—even crippling—TJ’s transformative potential’.<sup>47</sup>

A Kuhnian paradigm is a product of the collective will and consent of those who propose and practice it,<sup>48</sup> not a pre-designed blueprint for a discipline (despite the need for practical exemplars), and not a self-contained explanation of its place in society, let alone a grand narrative. For these reasons, this section of the chapter does not assert or examine any claim that therapeutic jurisprudence can somehow explain, describe or justify the whole legal system. In fact, a claim that a Kuhnian paradigm somehow provides any overarching narrative for a given field or discipline is a *non sequitur*. What I am considering here, however, is the possibility that therapeutic jurisprudence can provide *exemplars* that provide the primary benchmarks for assessing whether any legal rule or legal process is valid<sup>49</sup> and whether any legal actor is acting validly (in a professional sense). These are not exclusive benchmarks, but they are those that are the most fundamental; namely, those that cannot be severed from the juristic model. An exemplar, as described in Chapter 2, is an example of a solution to a puzzle within the discipline, with which all proposed future solutions must align.<sup>50</sup>

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<sup>47</sup> Mark Satin, ‘Healing First: Time for the US Justice System to Get Less Mechanistic and More Compassionate’ (2998) 119 *Radical Middle Newsletter* 2.

<sup>48</sup> Kuhn describes this as the ‘constellation of group commitments’: SSR 181.

<sup>49</sup> In a sense other than the constitutional or legislative heritage and compliance of the rule.

<sup>50</sup> An exemplar exceeds what we would think of as an ‘example’. An exemplar is not just an illustrative instance of a phenomenon, it is an example that, due to its status as an exemplar, prescribes conditions by which other objects can legitimately be held to be a

At its most basic then, the question here is whether therapeutic jurisprudence provides benchmarks or criteria against which any legal rule, legal actor or legal process can be measured to determine whether that rule, actor or process is valid in the eyes of those all those involved in, and affected by, those rules, actors and processes.<sup>51</sup> It is not difficult to find posited therapeutic protocols and rules that could be conceived of as exemplars, the question is how far, conceptually, do such exemplars stretch and whether they are broad enough to generate the framework of a juristic model.

If we accept the position of Wexler and Winick that the basic therapeutic jurisprudence agenda is to ask ‘whether the law’s anti-therapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values’<sup>52</sup>—what potential is there, then, to elevate these therapeutic questions to the level of co-requisites with due process (adversarial) exemplars? Could we conceive of a set of juristic exemplars with symbiotic components, to the extent that we might say, ‘no legal rule, role or process must generate avoidable anti-therapeutic consequences, unless such avoidance would subordinate due process requirements?’<sup>53</sup>

For example, a very common finding of evaluations of drug court processes and outcomes is that the strongest factor that determines the

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member of the same class of things. This is discussed in much greater depth in section 6.2.

<sup>51</sup> In order to be conceived of as paradigmatic of anything, however narrow or broad, therapeutic jurisprudence would need to provide the relevant exemplars that solve intractable problems.

<sup>52</sup> David Wexler and Bruce Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) 17.

<sup>53</sup> Note that this is not the only way that a possible therapeutic exemplar could be articulated, but for the purposes of this thesis it sufficiently describes the sort of normative force that such an articulation would need to carry in order to support a purported therapeutic paradigm.



success of drug court programs is the interventionist style and conduct of the judge, which provides a stark contrast to the typically reserved and detached demeanour of the adversarial judge. Rempel, Zweig et al, found, in a survey of 23 drug courts across six US jurisdictions, that those judges whose court behaviour correlated most highly with better participant outcomes were described as more involved and interventionist, that is, those who were 'more respectful, fair, attentive, consistent and caring'.<sup>54</sup> The judges who scored most highly against these criteria were more closely associated with reduced recidivism and drug use in offenders after 18 months of completing their drug court programs. Although many of these descriptors could be used to characterise the work of mainstream judges, they do not all command the status of disciplinary exemplars in the adversarial court. They are good practice, certainly, but not all are required to the extent that a judge would not be acting judicially without manifesting them. Thus, we can certainly conceive of these sorts of descriptors as potential exemplars, but a mainstream judge acting in an uncaring manner or who placed a stronger emphasis on appearing detached and reserved (rather than on being meaningfully involved and interventionist) would probably not be considered to be acting inappropriately.

The juristic model itself is an abstraction and does not need to exhaustively explain and reconcile all the elements of new legal rules and processes.<sup>55</sup> The model ought, however, to be able to inform each, and any, of those processes to the extent that it can provide exemplars for the solution of problems (rather than simply puzzles in the Kuhnian sense). Both the extensive body of therapeutic jurisprudence literature, and the application of therapeutic jurisprudence principles in so many legal and

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<sup>54</sup> Michael Rempel, Janine M Zweig, Christine H Lindquist, John K Roman, Shelli B Rossman and Dana Kralstein, 'Multi-Site Evaluation Demonstrates Effectiveness of Adult Drug Courts' (2012) 95(4) *Judicature* 154, 156.

<sup>55</sup> This is consistent with the Kuhnian view that there are always anomalies within a discipline, but that these are not particularly significant until they constitute a disciplinary crisis of sufficient breadth to precipitate a paradigm shift.

judicial practices, demonstrates that there is significant potential for the movement to provide exemplars for an increasing number of processes.<sup>56</sup>

It is beyond the scope of this thesis to enumerate how each of the posited processes for a juristic model relate to various therapeutic jurisprudence initiatives or principles, but given that a change of paradigm does not change everything within a disciplinary matrix, this is not a critical omission.<sup>57</sup> As noted above, there is significant reluctance expressed by some key figures in the therapeutic jurisprudence community to allow the movement to be conceived of as somehow radical or to be defined by its critics in terms so broad as to open itself to academic ridicule and professional marginalisation. King, Freiberg et al have considered the sort of criticism that holds that therapeutic jurisprudence attempts too much and is, therefore, conceptually meaningless. They note critical assessments of therapeutic jurisprudence that argue that it 'contemplates a global, and therefore meaningless interface between the law and the human condition or human behaviour'<sup>58</sup> or that it is touted by its advocates as 'not unlike mediation, as a cure for the all-too-real ills of the adversarial system'.<sup>59</sup> This explains, in part, their warning that therapeutic

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<sup>56</sup> One of the most recent demonstrations of the breadth of therapeutic jurisprudence scholarship is the content of the papers presented at the *Non-Adversarial Justice: Implications for the Legal System and Society Conference*, convened by the Australian institute of Judicial Administration and Monash University, Melbourne, Australia, 4–7 May 2012. Speakers analysed the application of therapeutic jurisprudence to many disparate areas of law including, criminal procedure and sentencing, family law procedures, dispute resolution, administrative appeals, taxation enforcement, community title disputes in real estate matters, personal injuries practice, the rules of evidence, reconciliation processes in South Africa, legal ethics and professional regulation, legal education and training, emotional intelligence for judges and lawyers, court architecture and commercial litigation.

<sup>57</sup> This is true of other potential paradigms such as that potentially delineated by feminist jurisprudence or critical legal studies, for example.

<sup>58</sup> Samuel Brakel, 'Searching for Therapy in Therapeutic Jurisprudence' (2007) 33 *New England Journal on Criminal and Civil Confinement* 455, 465.

<sup>59</sup> *Ibid* 467.

jurisprudence is 'not presented as a defence or indeed a critique of the justice system or society generally'.<sup>60</sup>

Thus, although there is no need for a juristic model to provide any grand narrative, it must provide an exemplar-based, theoretical framework on which the processes of civil and criminal litigation in common law courts are scaffolded. To the extent that such a model defines what the law is, what it does and what it should do, it needs to provide fundamental statements about the nature and purpose of basic legal institutions and concepts. Despite the wide range of legal contexts in which therapeutic jurisprudence has been used as a diagnostic lens, and even as a potential provider of disciplinary exemplars, there is, as yet, no critical mass of scholarship or analysis that constructs it as a wide enough enterprise to comprise a juristic model. It does not, for example, have any penetration into such fundamental sources as written constitutions or even significant amounts of legislation. There is very little (if any) acknowledgement of adversarialism in the written constitutions of the common law jurisdictions either.

There is an obvious tension in therapeutic jurisprudence research and commentary (and in that of the critical literature) between those who see therapeutic jurisprudence as an essentially normative agenda and those who prefer to characterise it as more neutral and utilitarian. Those (fewer) researchers who see it as a transformative and wider agenda express frustration at the narrower characterisations. Satin, in particular, calls for Wexler and the other leaders of the movement to 'stop the charade', and 'drop the fig leaf'; in other words, to challenge the centrality of the adversarial paradigm itself and use therapeutic jurisprudence to 'reinvent the very nature of the law-and-justice system itself'.<sup>61</sup> That could be

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<sup>60</sup> King, Freiberg et al, above n 25.

<sup>61</sup> All quotes from Mark Satin, 'Healing First: Time for the US Justice System to Get Less Mechanistic and More Compassionate' (2008) 119 *Radical Middle Newsletter*. Satin's jurisprudence stems from his political and social perspective, which is closely aligned with the so-called radical centre in US politics. The core belief of this wider political agenda is

construed as a call for a Kuhnian paradigm shift, and comparing the conceptual depth of that call with the call of Freiberg for his version of a paradigm shift (discussed in Chapter 1) highlights the need for, and value of, this ontological analysis of therapeutic jurisprudence. Are these views best seen as contradictory, contrary or complementary?

To conceive of therapeutic jurisprudence as potentially constituting a complete juristic model is not obviously fallacious. It is a rapidly expanding and evolving movement. Whether such a conceptually broad ambit is realistic, desirable or likely, however, remains to be seen. If we were to assert that all legal rules, roles and actors must be subjected to a therapeutic filter (comprised of therapeutic exemplars), as well as a more formal due process or legal positivist filter, then this symbiotic model would come close to positing therapeutic jurisprudence as a juristic model. To claim, however, that therapeutic jurisprudence currently does have that quality would not be defensible. The issue of potential incommensurability at this ontological level, while of some speculative interest, lacks immediacy. Next, I consider whether it could be part of a wider paradigm that, itself, informs a juristic model.

### **5.2.3 Therapeutic Jurisprudence as Part of a Wider Therapeutic or Non-Adversarial Paradigm**

Since the 1960s there has been no shortage of academic and professional legal movements that have in common a mistrust of a legal system that is paradigmatically adversarial. Although a number of these have gained individual traction and forced some key reforms of specific laws and of how the law functions, the adversarial paradigm remains intact. Some of these movements and approaches have been combined, either by design or in a more ad hoc way, into identifiable clusters. These clusters

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that policy ought to be directed towards the needs of specific, individual citizens and communities rather than what is best for the State (an ideologically typically associated with the political left) or for the market (an ideologically typically associated with the political right): Mark Satin, *Radical Middle: The Politics We Need Now* (2004).

obviously have some common themes and values beyond a simple opposition to an exclusive reliance on adversarial exemplars as the benchmarks for validity.<sup>62</sup> One thing these clusters share is a desire to move beyond the prolonged period of Kuhnian normal science in which the law has been functioning. The most obvious characteristic of a period of normal science, according to Kuhn, is a 'dearth of major novelties, conceptual or phenomenal'.<sup>63</sup> During these times, the failure of the discipline to achieve the results expected of it are characterised as the failure of the practitioners (scientists) involved.

Practitioners who never, or rarely, fail to resolve the issues on which they work develop (quite rightly) reputations as expert puzzle solvers. However, the really pressing problems such as a cure for cancer do not get resolved during a period of normal research, says Kuhn, because they have no solution.<sup>64</sup> He makes the analogy of an expert jigsaw puzzle solver trying to assemble a complex jigsaw puzzle by taking pieces from two separate boxes. No matter how talented the person attempting the puzzle, it can never serve as a test of their puzzle-solving skills because it is not a puzzle at all. It is a problem whose solution lies within the ambit of a different paradigm. A judge within a mainstream criminal court who tries to rehabilitate a drug-addicted offender without having the requisite training and without being able to prescribe something like an Intensive Drug Rehabilitation Order is virtually doomed to fail. The resources needed to address the extra-legal issues at the heart of the offending conduct are not generally available within a mainstream criminal court.

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<sup>62</sup> An example would be the unification of several strands of reactionary jurisprudence, mostly evolving from American legal realism, into the critical legal studies movement of the 1970s and 1980s. Various strands of CLS scholarship are still discernible in research clusters at Harvard Law School, Georgetown University Law Center, Northeastern University, University at Buffalo, Birkbeck, University of London, University of Melbourne, University of Kent, Keele University, the University of Glasgow and the University of East London—among others. Some researchers and practitioners have formed off-shoots, such as those committed to critical race theory.

<sup>63</sup> SSR 35.

<sup>64</sup> Ibid 40.

One crucial thing that a discipline acquires from its paradigm is a set of criteria by which practitioners can choose which problems can be assumed to have a solution. Problems that do not align with these criteria are ostracised as being metaphysical or as belonging to another discipline. Kuhn expresses the wider social implication of that reality in this way:

A paradigm can ... insulate the [practitioner] community from those socially important problems that are not reducible to the puzzle form, because they cannot be stated in terms of the conceptual and instrumental tools the paradigm supplies.<sup>65</sup>

A key reason for the rapid development of a discipline, says Kuhn, is that practitioners thereby focus on problems that are only lacking a solution due to their own lack of ingenuity. A practitioner who comes along with a more precise instrument or a refined version of an existing experimental design is touted as a hero. Interestingly enough, law and jurisprudence are characterised by both significant advancement and precision and by a lack of success in engaging with some of the wider social problems that create and inform legal problems. The fact that clusters of movements and approaches opposed to an exclusive adversarialism in law tend to involve collaboration and hybridisation of data and method from other disciplines is illustrative of this Kuhnian truth.

It is quite common, in the relevant literature, to conceive of and label therapeutic jurisprudence as a 'lens'. It is worth considering what this means in terms of the ontological question. We ought not to confuse different conceptions of what a lens might be in relation to Kuhnian paradigms, especially in the context of analysing the purported place of therapeutic jurisprudence within the wider schema of non-adversarial approaches to law.

It was mooted in the conclusion of the previous section that therapeutic jurisprudence could potentially provide benchmarks or criteria against

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<sup>65</sup> Ibid 37.

which any legal rule, legal actor or legal process can be measured to look for anti-therapeutic effects and consequences, but that we are currently a long way from seeing such a filter universally adopted as a method of gauging the validity of legal rules, actors or processes. However, therapeutic jurisprudence is sometimes seen, in the literature and in practice, as one component within a wider set of filters.<sup>66</sup>

To that end, we need to consider whether therapeutic jurisprudence could, in fact, be part of a wider non-adversarial paradigm that contains this wider set of filters, given that the conceptual core of this thesis relates to the relationship between therapeutic jurisprudence and adversarialism and the nature and extent of any Kuhnian incommensurability between the two. If we can conceive of a wider juristic paradigm, which subsumes therapeutic jurisprudence as a non-severable subset, we can then ask with this wider paradigm is incommensurable with adversarialism.<sup>67</sup>

As mentioned in Chapter 3, Daicoff nominates therapeutic jurisprudence as one of a number of vectors within what she refers to as the ‘Comprehensive Law Movement’, all of which are striving to explicitly recognise and value law’s potential as an agent of ‘positive interpersonal and individual change and which seek to bring about a positive result’<sup>68</sup> (such as healing, wholeness, harmony, or optimal human functioning) as part of the resolution of legal matters. These vectors may either provide *alternative* ways to resolve these matter or their underlying contexts, or they may *complement* and optimise the more traditional legal processes. They attempt this, she claims, by integrating and prioritising extra-legal concerns—factors beyond strict legal rights and duties—into law and legal practice. These ‘rights plus’ factors (as she calls them) include such

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<sup>66</sup> Other labels for approaches to law and legal practice in a similar vein are ‘vectors’ and ‘newer practice models’.

<sup>67</sup> This question is considered in some depth in Chapter 6.

<sup>68</sup> Susan Daicoff, ‘Growing Pains: The Integration vs Specialisation Question for Therapeutic Jurisprudence and Other Comprehensive Law Approaches’ (2008) 30 *Jefferson Law Review* 551, 553.

elements as: 'needs, resources, goals, morals, values, beliefs, psychological matters, personal well-being, human development and growth, interpersonal relations, and community well-being'.<sup>69</sup> Thus, it is important to recognise that what she describes, and advocates, are modifications to legal methods and procedures, not other (non-legal) methods to do a similar job.

Daicoff<sup>70</sup> has attempted to identify and explicate what it is that a number of alternative approaches to the adversarial practice of law have in common. She analyses new approaches and 'emerging paradigms'<sup>71</sup> that eschew the wholly adversarial, other-blaming, position taking tradition that we are all familiar with and suggests that these new vectors<sup>72</sup> are all based on the assumptions that :

1. law ought to optimise the psychological well-being of all those involved in it
2. law ought to be concerned with a wider set of rights than just strict legal rights.

To some extent she appears to be correct in identifying a convergence of these approaches—and convergence may be necessary for these vectors to have any significant reforming effect on legal institutions and processes<sup>73</sup>—but her construction of these vectors into a movement (the comprehensive law movement) may be a little premature.

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<sup>69</sup> Ibid. This is her most recent and comprehensive contribution to the field, although she has been analysing these approaches since at least 2000—and she claims that these approaches were merging and synergising as early as 1997. See also Susan Daicoff, 'The Role of Therapeutic Jurisprudence in the Comprehensive Law Movement' in Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: The Law as a Helping Profession* (2000) 465.

<sup>70</sup> Daicoff, above n 68.

<sup>71</sup> Intending, it is assumed, a relatively non-rigorous use of the term 'paradigm'.

<sup>72</sup> She provides here that vectors are approaches that represent 'forward movement and convergence towards common goals'.

<sup>73</sup> In the sense that they may constitute a hybrid paradigm.



The approaches she identifies as informing the comprehensive law movement include:

1. collaborative law
2. creative problem solving
3. holistic justice
4. preventive law
5. problem-solving courts
6. procedural justice
7. restorative justice
8. therapeutic jurisprudence
9. transformative mediation.<sup>74</sup>

Daicoff claims that these new approaches represent an emerging, alternative juristic paradigm that is an inevitable response to what she calls the tripartite crisis in the legal profession—namely, poor public confidence in the law, stress and depression among lawyers and decreasing professional standards.<sup>75</sup> The movement is comprehensive in that it is interdisciplinary, integrated, humanistic, restorative and therapeutic. Each vector recognises that it is a function of law to act as an agent for positive interpersonal or individual change in some way (such as healing, wholeness and restoration). They also emphasise ‘rights plus’ as a legitimate concern of legal processes—for example, needs, resources, morals and values and personal well-being.

Daicoff expressly asserts that these vectors represent a number of new lenses that, together, are at least consistent with a new paradigm in law.

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<sup>74</sup> She gives a brief synopsis of each vector here:

<<http://www.fcsi.edu/faculty/daicoff/vectors1.htm>>.

<sup>75</sup> This she says include ‘Rambo style litigation’ and ethically questionable conduct.

Daicoff is also a psychologist and has written a seminal work on the links between the typical lawyer personality and the problems in the profession: Susan Daicoff, *Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* (2004).

She establishes the character and independence of these lenses by claiming:

Until now, the legal system offered only one 'lens,' the traditional approach to lawyering. This lens typically focuses on legal rights, duties, and responsibilities and on resolution of legal matters and disputes. The comprehensive law movement adds at least five more 'lenses.' Each of these new lenses focuses on concerns, beyond legal rights, through which to view legal matters.<sup>76</sup>

It is noteworthy that Daicoff seems to assert that there is an adversarial lens that is used to examine and interpret the legal system, but that it would be inappropriate to consider such a lens as exclusive. The traditional role of the law, she suggests, is the resolution (via neutral adjudication) of legal matters and disputes. However, the only way to assess the validity of such resolutions is by applying the criteria of legal rights, duties and responsibilities. This is the quintessential positivist core of adversarialism—liberal notions of due process informing the application of formally enacted legal norms. However, although Daicoff does assert that the comprehensive law movement (including therapeutic jurisprudence) provides vectors that ought to be given the same status as an 'interpretive lens' that is currently enjoyed by adversarialism, she also claims that many of them are more than mere lenses or filters. She claims some practical and independent roles. She continues:

Despite perhaps being limited to one 'lens,' the existing legal system offers a number of 'processes' which can be used to carry out the goals identified by the traditional 'lens.' The existing processes include: litigation, mediation (facilitative and evaluative forms thereof), arbitration, private adjudications, private trials, and old-fashioned negotiation and settlement<sup>77</sup>.

When Daicoff characterises these vectors of the comprehensive law movement as incorporating a 'rights plus' approach to working on disputes, what she means is that they do so with a bigger toolbox than just

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<sup>76</sup> Daicoff, above n 68, 10.

<sup>77</sup> Ibid 10.

that provided by adversarialism.<sup>78</sup> The vectors allow for a consideration of extra-legal factors and not only the sorts of formal legal rights and obligations that we would see provided for in statutes, for example. If these types of factors are going to be given credence, then the processes of addressing the disputes obviously lends itself to a collaborative and interdisciplinary approach. This is exactly the kind of model on which most of the problem-solving courts and the neighbourhood justice centres are based.

This consideration of non-legal factors in the resolution of a dispute or the administering of justice is currently antithetical to what is traditionally done in a common law court, and to what is taught in law schools. Law students are typically required to recognise and disregard factors that do not contribute to a legal decision and the ability to do this well generally makes a 'good' student and ultimately a 'good' lawyer or judge (contrary to some of the rhetoric in law schools and the profession about the importance of such things as client care). This then is the ethos that they would be expected to take to the bench.

This tension between the law as an arbiter of formal rights and the law as a part of a wider solution to disputes and dysfunctional relationships is conceptually reminiscent of Carol Gilligan's<sup>79</sup> observations that the law moves away from 'an ethic of care' towards a model based (formulaically) on rights and justice. The (apparent) contest is between beliefs that the law is limited to resolving disputes by a strict analysis of whose rights and interests are more important rather than by trying to reconcile or repair. In considering the scope of therapeutic jurisprudence as a comprehensive law movement vector, Daicoff cites Slobogin's definition of therapeutic

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<sup>78</sup> Daicoff credits Pauline Tesler with the creation of the phrase 'rights plus', in Tesler's work with the collaborative law community, as applied in Tesler's work as a collaborative divorce lawyer: *ibid* 9.

<sup>79</sup> Gilligan's work in this area is a reaction to the perception that Kohlberg's theory of moral development does not seem to fit well with the interpersonal focus that is said to characterise the female psyche: Carol Gilligan, *In a Different Voice* (1982).

jurisprudence: 'the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects'.<sup>80</sup> She categorises Winick and Wexler's agenda as asking 'whether the law's anti-therapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values'.<sup>81</sup>

The main contribution of Daicoff for the purposes of this thesis, though, is that she proposes paradigm status for a juristic model that *includes* therapeutic jurisprudence in a stronger sense than virtually any other contributor to the literature, with the possible exception of Freiberg. She claims that the lenses and vectors of the comprehensive law movement are all consistent with 'a different paradigm for the resolution of legal matters'.<sup>82</sup> She then links the assertion of an emergent new legal paradigm to paradigmatic changes in wider political and social institutions, mainly by reference and analogy to work done by feminist legal academics and researchers of post-enlightenment developments in law and society. Her analysis in this regard is closely linked (although she does not expressly make the connection in her paper) with the requirement of a changed worldview or *Weltanschauung* as a basis for a Kuhnian paradigm shift (as discussed in Chapter 2).

She makes the quite sanguine claim that a reshaped geo-political world characterised by globalisation and a less adversarial international political mentality as a result of the end of the Cold War have contributed to a growing societal awareness of our connectedness to, and an open mindedness towards, all people, all countries and all cultures in the world, and that as a result:

our society has witnessed the decline of a philosophy focused on individual rights, logic, and reason and the concomitant rise of a

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<sup>80</sup> Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy and the Law* 193.

<sup>81</sup> Wexler and Winick, above n 52, 72.

<sup>82</sup> Daicoff, above n 68, 11.

counterbalancing ethos, focused on compassion, care, relationships, and connectedness.<sup>83</sup>

As we would expect of such a broad and influential movement, attempts have been made to conceptually integrate therapeutic jurisprudence within the ambit of other jurisprudential clusters, apart from Daicoff's mooted comprehensive law. Marchetti and Daly include therapeutic jurisprudence within the rubric of what they refer to as 'New Justice Practices'.<sup>84</sup>

There have, therefore, been well-thought-out, evidence-based and credible attempts to conceive of therapeutic jurisprudence as a constituent part of a broader non-adversarial paradigm and juristic model. In fact, as demonstrated by the work of Daicoff and others, there have even been attempts to make preliminary inventories of what these constituent parts may be, and what values and protocols these parts must share in order to generate disciplinary exemplars.

#### **5.2.4 Therapeutic Jurisprudence as a Problem-Solving Paradigm**

In this section I consider whether therapeutic jurisprudence may be paradigmatic of a problem-solving approach to just some particular forms

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<sup>83</sup> She postulates that this may be as a result of 'a growing diversity in our power structure, governments, corporations, schools, and other institutions. The ethics and values of previously disempowered individuals may have begun to seep into our collective consciousness': *ibid* 44. This is strongly reminiscent and reflective of the discussion in Chapter 2 concerning the intimate relationship between worldviews and paradigms.

<sup>84</sup> Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415, 423. In a similar vein, Brooks and Madden identify TJ, preventive law, restorative justice and transformative mediation as vectors or components of what they construct as 'relationship-centred lawyering': Susan Brooks and Robert Madden, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice* (2010). We could also add the construct of 'psycho legal soft spots and strategies', an attempt to co-conceptualise therapeutic jurisprudence and preventive law: King, Freiberg et al, above n 25, 65.

of legal work. This is something less than providing a paradigm for a juristic model, or being a constituent part of a wider paradigm that, itself, informs a juristic model. If this were to be the case, then the crucial matter of incommensurability still arises where the exemplars of that narrower paradigm conflict with those provided by the adversarial paradigm.

An ontology of this kind would compare different ways of applying the law, rather than comparing different conceptions of what the law is. Wexler alludes to this ontology in making the following observation about therapeutic jurisprudence practices, in relation to the roles and behaviours of legal actors:

Note that the TJ emphasis on ‘roles’ relates basically to the *administration* of the law. That emphasis, in turn, flows from another conceptual framework—that of distinguishing proposals for actual law ‘reform’ from those of ‘applying’ the existing law more therapeutically.<sup>85</sup>

That is a very useful articulation of the baseline position with respect to the relationship between adversarialism and therapeutic jurisprudence. It promotes therapeutic jurisprudence as a problem-solving dynamic rather than as explanatory.

The idea of therapeutic jurisprudence comprising a heuristic framework could go a little beyond establishing therapeutic jurisprudence as merely a set of practical tips and anecdotal successes. Wexler has asserted that ‘therapeutic jurisprudence scholarship has also provided a conceptual framework for thinking specifically about lawyering and judging in the criminal law sphere’.<sup>86</sup> An ontology of this kind might posit that the correct or best way of proceeding, in some cases, is not predetermined by a substantive rule, especially where an exhaustive search and analysis of such rules may be required, but by applying common-sense, experience and a consideration of the well-being of the participants. There would seem to be significant potential for synergy between research into the role

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<sup>85</sup> Wexler, above n 23, 34.

<sup>86</sup> Ibid 35.

of heuristics in legal decision making and the enduring tension between efficiency and effectiveness in the practice of law.<sup>87</sup>

The most common claim made by advocates of a new paradigm is that it can resolve the problems that have been intractable under the existing paradigm. That tends to be a strongly influential claim, but not always sufficient. This is perhaps one of the strongest indicators that therapeutic jurisprudence promises to be paradigmatic rather than incremental. There are weaknesses and failings of both the civil and criminal law that are perennial, notorious and apparently intractable.

Recidivism among criminal offenders and the failure of policies and practices of rehabilitation have been a particularly vexing issue in criminal justice,<sup>88</sup> but the successes of a number of problem-solving courts in addressing recidivism by promoting and managing change in offenders has received significant attention and led to both a considerable expansion in the type and number of problem-solving courts and in calls for their techniques to be mainstreamed.<sup>89</sup>

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<sup>87</sup> There is some precedent for this in the extant literature. See, eg, Gerd Gigerenzer and Christoph Engel (eds) *Heuristics and the Law* (2007).

<sup>88</sup> The use of drug courts and the issue of criminal recidivism is used thematically throughout the thesis in light of the extensive research available, given that it is one of the oldest jurisdictions with a strong therapeutic jurisprudence and problem-solving influence. This is not to marginalise or ignore the other problem-solving jurisdictions.

<sup>89</sup> The claims that problem-solving courts have the effect of reducing recidivism are sometimes questioned or even denied, but there are credible reports in the literature of these successes. A meta-analysis of the relationship of Indigenous sentencing courts to recidivism and attendance rates, for example, is conducted in N Stobbs and G Mackenzie, 'An Analysis and Evaluation of Australian Indigenous Sentencing Courts' (2009) 13(2) *Australian Indigenous Law Review* 90. As to the proliferation of problem-solving courts, the latest incarnation seems to be rise of gambling treatment courts in many US jurisdictions: C Hinshaw, 'Taking a Gamble: Applying Therapeutic Jurisprudence to Compulsive Gambling and Establishing Gambling Treatment Courts' 9(4) *Gaming Law Review* 333. The 141 referenced evaluation reports in relation to drug courts in the US are archived by the Drug Court Technical Assistance Project available online at <<http://www1.spa.american.edu/justice/>>. The range of resources and reports stored

Pursuant to the adversarial paradigm, courts had little scope to anything close to the style of judicial management seen in venues such as the drug courts, and compliance with sentencing law can readily be characterised as puzzle solving in the Kuhnian sense. A sentencing judge in a mainstream court is hardly likely to invite the prosecution, defence lawyer and offender to join with the judge as a team in seeking to treat the cause of the offending behaviour and agree to meet regularly to review progress. Although just that approach is possible (especially with enactment of enabling legislation such as the *Drug Court Act 2000* [Qld]),<sup>90</sup> it is generally restricted to specifically convened courts.

A mainstream sentencing court is primarily concerned<sup>91</sup> with imposing penalties according to legislative sentencing factors. It is not too difficult to conceive of this change in approach to drug-addicted offenders as reflective of a change in broader worldviews. There has been a clear jurisprudential, legislative and political trend to view some classes of offence as a social and public health issue rather than as simply a legal problem. It is often argued that the drug courts themselves are as much a development in public health policy as an evolution in court functions.<sup>92</sup>

The adversarial approach has always been to view property offences and offences of violence committed by those with drug addictions primarily as

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there are vast—especially regarding recidivism rates and graduation rates and various correlations between recidivism results and program operational features.

<sup>90</sup> S 18 of that Act, for example, provides that a Drug Court Magistrate may make an intensive drug rehabilitation order, and that option would not be open to a magistrate in a mainstream court. Legislation to abolish the drug court is soon to be introduced to the Queensland Parliament, however.

<sup>91</sup> Some would say exclusively concerned.

<sup>92</sup> Terry Carney, David Tait et al, 'Mental Health Tribunals: Therapeutic Jurisprudence Implications of Weighing Fairness, Freedom, Protection and Treatment' (2007) 17(1) *Journal of Judicial Administration* 46; K Diesfeld and B McKenna, 'The Unintended Impact of the Therapeutic Intentions of the New Zealand Mental Health Review Tribunal: Therapeutic Jurisprudence Perspectives' (2007) 14 *Law and Medicine* 566.



anti-social behaviour that needs to be addressed judicially by way of deterrence and punishment. Granted, most jurisdictions have long allowed a sentencing judge to include components of rehabilitation in a sentence, but this sentencing purpose has traditionally been drastically under-resourced, arguably pursuant to a more punitive and positivist worldview that treats offenders as simplistic and two-dimensional moral subjects.

There is certainly a strong Kantian tradition that informs and infects the adversarial worldview. Morality, being a transaction between rational agents, is at the heart of the doctrine of *mens rea*, which generally holds that a person is morally and legally responsible for their actions so long as they know what it is that they are doing and their choices are deliberate. Modern criminological and mental health research shows that the role of rational choice in offending is much less important than traditionally believed, and much less so in the case of those whose offending is related to pathology (such as those who are drug addicted).<sup>93</sup>

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<sup>93</sup> Rachel Hill, 'Character, Choice, and "Aberrant Behavior": Aligning Criminal Sentencing with Concepts of Moral Blame' (1998) 65(3) *University of Chicago Law Review* 999; R Paternoster and G Pogarsky, 'Rational Choice, Agency and Thoughtfully Reflective Decision Making: The Short and Long-Term Consequences of Making Good Choices' (2009) 25(2) *Journal of Quantitative Criminology* 103. Notions of human agency are a prominent part of many criminological theories. Rational choice theory arose out of the positivist tradition, which reduces offending behaviour to a set of observable internal and external factors and suggests that criminal conduct can be regulated, managed and reduced by, inter alia, careful design of the physical environment (such as the playing of classical music in shopping centres to discourage loitering or the improvement of street lighting to discourage car theft). Contemporary theories of critical criminology have long since abandoned the positivist conceptions of crime and, by implication, the naive liberal worldviews which inform it.

Being a highly conservative discipline, the law appears to be quite slow in keeping abreast of changes in criminological theory and scholarship. It would take quite an effort, for example, to convince the judiciary and the legislature to consider the implications of work in contemporary postmodern philosophy and Lacanian psychoanalysis, as they affect modern hybrid criminological theories that, according to Hall, Winlow and Ancrum, 'seek to explain how the dynamic tension between inclusion and exclusion prolongs the narcissistic subject throughout the life-course in an aggressive struggle for identities of

Evidence of the express acceptance of superior mainstream courts in Australia of submissions based on heuristics evolved from therapeutic jurisprudence principles are not hard to find. In the New South Wales Court of Appeal, for example, the full bench made express acknowledgement of the validity of argument from Counsel appealing the severity of a criminal sentence from therapeutic jurisprudence principles. Judge of Appeal Charles (with whom the rest of the bench concurred) acknowledged the force of the arguments by Counsel:

It was submitted that it was within the judge's sentencing discretion to extend a degree of leniency to Uren to maximize the prospect of rehabilitation by attempting to halt the process of institutionalisation. [Counsel] submitted that the judge's approach reflected principles developed in the growing body of literature dealing with 'therapeutic jurisprudence' and argued that there is emerging empirical evidence that offenders can be rehabilitated where appropriate rehabilitation programmes are combined with an approach to sentencing by judges that supports rather than undermines the rehabilitation process.<sup>94</sup>

The assertion here is that both academic and judicial opinion can be identified, to the effect that therapeutic jurisprudence can provide exemplars for the resolution of problems that the prevailing adversarial paradigm cannot. This is evidence of an emerging paradigm—at least in the heuristic sense.

Sometimes an argument that an alternative paradigm is neater, simpler or more streamlined (even if its predictive or explanatory ability is only marginally better) can be influential. Kuhn claimed that the subjective and aesthetic considerations are important.<sup>95</sup> Identifying and explaining a paradigm shift while it is in progress is usually impossible and it is not until after it has been accepted, tested and applied that the most decisive

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social distinction expressed by the acquisition and display of consumer culture's status-symbols'. Fining a juvenile for shoplifting on the basis that they are a free moral agent living in a liberal world would seem less fraught: S Hall, S Winlow and C Ancrum, *Criminal Identities and Consumer Culture* (2008) 82.

<sup>94</sup> *Director of Public Prosecutions v Deon Lee Uren* (2003) VSCA 208 per Charles JA [18].

<sup>95</sup> SSR 94.

arguments are developed. While the shift is occurring, traditionalists may claim that the new paradigm is popular just because of some initial success and that it is really just a novel sort of lens with which to help diagnose and fix problems within the existing paradigm.

Given the convoluted and reactive development of the adversarial paradigm over several centuries, it seems unsurprising that it lacks structural and theoretical clarity and precision. Attempts to retain the threads of adversarialism in areas in which the law is experiencing important and successful evolutionary growth only exacerbate this structural messiness. In assessing the inability of the adversarial system to cope with post-enlightenment worldviews and to make best use of the enormous body of social science data now available to us, Menkel-Meadow suggests that:

[b]inary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarised debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies. More significantly ... are not susceptible to a binary (i.e. right/wrong, win/lose) solution. Courts with what ... 'limited remedial imaginations' may not be the best institutional settings for resolving some of the disputes ... before them.<sup>96</sup>

King expresses the concern of a number of those working at the judicial chalk-face of the criminal jurisdiction that to characterise a particular court or program as problem-solving can give rise to the unwarranted, and counterintuitive, assumption that the court is there to solve the participants' problems for them. This can act to both disempower the participant, but also to reinforce the suspicions of some therapeutic jurisprudence critics that its agenda is both patronising and coercive.

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<sup>96</sup> Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1997) 38 *William and Mary Law Review* 5, 6. Even if we were not to subscribe to the postmodern theoretical perspective from which the author of that paper is obviously arguing, the observation (I assert) is still compelling.

The answer, King suggests, is to conceive of, and label the relevant courts as 'solutions-focused' or 'solutions-oriented' courts. He notes that:

To assert that a court solves participants' problems—as claimed in the problem-solving court literature—is to discount participants' efforts made prior to entering the program, while on the program and after completing the program in the direction of positive behavioural change. As with other interventions that have a therapeutic effect, problem-solving courts should be regarded as time-limited interventions that help facilitate and support the change process. In other words, the efforts of the individual participant and the support of the court and allied treatment and support services combine to promote the change process.<sup>97</sup>

Another way of conceptualising the rise of a therapeutic paradigm is in the socio-political context of the increasing social transfer, and change in the nature of power, from monarchs to an autocratic aristocracy to a burgeoning middle class. According to Schwan and Shapiro:

the bourgeoisie have maintained authority by creating modern forms of subjectivity through a dual process: making an individual a non-threatening, subordinated political 'subject' while simultaneously installing a new kind of personhood in identity.<sup>98</sup>

Foucault conceives of this sort of power as being produced by a particular form of knowledge: knowledge that is a definitive truth concerning the behaviour, motivations and personality of the individual. This socially constructed knowledge of self-disciplines the individual in the sense that it imposes and justifies a social definition of normality. The instruments of this imposition are institutions such as schools and prisons and the 'supervising' judgments of professionals such as teachers and judges.<sup>99</sup>

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<sup>97</sup> Michael King, 'Solution-Focused Judging Bench Book' (2009) *Australasian Institute of Judicial Administration* 4.

<sup>98</sup> Anne Schwan and Stephen Shapiro, *Foucault's Discipline and Punish* (2011) 11.

<sup>99</sup> Foucault goes further than this, suggesting, as paraphrased by Schwan and Shapiro that 'the move from excessive public, physical punishments to private, invisible discipline of our psychological sense of selfhood [is] a middle class tactic to control forms of popular mass socialisation and alternative political and economic outlooks': *ibid* 12. This does seem to fit quite neatly with the assertions of Fukuyama (discussed in Chapter 2) that the liberal democratic state represents the end state of human political organisation.

In *Discipline and Punish*, Foucault illustrates the development of the power to socially construct identity, and therefore, to punish deviance, by an examination of the development of the insanity defences in the criminal jurisdictions of Europe and the US. As early as 1810, the criminal codes of the European jurisdictions were providing that where an offender was of unsound mind at the time of the impugned act, there could be no crime. There was a procedural and conceptual separation as to the issues of determining unsoundness of mind and of defining an act or omission as a crime. The gravity of the physical act was in no way diminished by the fact that the accused was insane, nor was the punishment reduced or altered by a finding of insanity. The crime itself was simply deemed not to have occurred. However, with the significant developments in the fields of psychology, psychiatry, pharmacology and corrections in the 20<sup>th</sup> century, this original separation was significantly eroded and input from professionals in these fields became directly integrated in the formation of sentences.

This, says Foucault, has been a powerful force for the social construction of identity and normality. Unsoundness of mind does not now simply eliminate the existence of a crime; rather, every offence carries with it 'as a legitimate suspicion, but also as a right that may be claimed, the hypothesis of insanity and anomaly'.<sup>100</sup> Although principles of criminal responsibility grounded in mental health issues are generally more flexible than Foucault suggests in contemporary common law jurisdictions, it is clearly true that there have been some paradigmatic shifts in how the criminal law (and perhaps public law in general) views issues of mental capacity.

What we can take from this is that there is obviously scope for paradigmatic change and shift within particular areas of law that do not seem to have displaced what we would identify as the adversarial juristic

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<sup>100</sup> Michel Foucault, *Discipline and Punish* (1975) 20.

model. This is especially cogent given both the strong influence of Foucault's conceptions of social change on contemporary jurisprudence and the fact that he chooses penology as the example. It seems uncontroversial to suggest that a movement such as therapeutic jurisprudence could generate paradigmatic exemplars within the core of the adversarial paradigm, either as a set of complimentary exemplars or as precursors to an eventual shift to a wider non-adversarial paradigm.

### 5.3 Evidence of Paradigm Status

As alluded to in Chapter 3, there are at least three justifications for conceiving of legal thought and practice as potentially conforming to Kuhn's model of a paradigm. Those justifications can be extended to therapeutic jurisprudence in particular to garner evidence that it may have or acquire paradigm status in any of the three ontological categories discussed above.

The first justification for Kuhnian paradigm status is that of disciplinary acceptance. Chapter 4 established that lawyers, judges and legal scholars consider adversarialism to be paradigmatic. Adversarialism is at the core of legal practice and legal education. Granted, it does not preclude the adoption of non-adversarial units in the curriculum,<sup>101</sup> but these units are invariably either offered as elective undertakings or not necessarily required for professional admission.<sup>102</sup>

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<sup>101</sup> For example, LWB498 *Dispute Resolution and Non-adversarial Practice* is an elective offered as part of the Bachelor of Laws degree at the Queensland University of Technology. It has a counterpart in the Master of Laws degree, LWN182 *Specialist Courts, Commissions and Tribunals*, which trains practicing lawyers in the skills needed to work in drug courts, Indigenous sentencing courts and other non-adversarial fora. Enrolment in both units is strong and students from the postgraduate units have published journal papers on therapeutic jurisprudence issues in leading Australian law journals. See, eg, Duffy, above n 24.

<sup>102</sup> For admission as an Australian legal practitioner, students are generally required to qualify in a set of subjects referred to as the Priestly 11. These subjects were set down by

A number of key researchers, and critics, in the literature discuss therapeutic jurisprudence as a new paradigm—either in and of itself or as a component of some wider category such as comprehensive law.<sup>103</sup> A significant number of law schools include both undergraduate and postgraduate studies in therapeutic jurisprudence, comprehensive law and non-adversarial justice in their curricula. Judicial training in these lenses and vectors is relatively common. It is even becoming more common to read express reference to therapeutic jurisprudence in the published judgments of Australian courts and tribunals.<sup>104</sup>

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the Law Admissions Consultative Committee (chaired by Justice Priestley of the NSW Supreme Court and referred to as the Priestley Committee). Students wishing to practice as a legal practitioner must complete the following subjects as part of their law degree: criminal law and procedure, torts, contracts, property, equity company law, administrative law, federal and state constitutional law, civil procedure evidence and professional conduct (including trust accounting).

<sup>103</sup> See references, above n 62, n 63 and n 64. Also Michael King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 140, 141. Bryant and Faulks examine the extent to which the Family Court of Australia, operating pursuant to a policy of less adversarial proceedings, operates in a therapeutic paradigm (and conclude that those functions of the court are 'consistent with a therapeutic paradigm'): Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93, 108.

In accusing therapeutic jurisprudence of breaching the American equivalent of the Doctrine of the Separation of Powers, Hoffman characterises therapeutic jurisprudence as a paradigm that threatens the importance of judicial independence: Morris Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' (2002) 29 *Fordham Urban Law Journal* 2063, 2088; Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205, 221.

<sup>104</sup> See, eg, *Re Beryl Fairhall and Secretary, Department of Families, Community Services and Indigenous Affairs* (2007) AATA 1323; *Re Marion Collier and Repatriation Commission* (2007) AATA 1134; *Lee v State Parole Authority of New South Wales* (2006) NSWSC 1225; *B (Infants) & B (Intervener) v Minister for Immigration and Multicultural*

As discussed in Chapter 2, social scientists (usually drawing on the criteria suggested by Handa)<sup>105</sup> refer to specific criteria in determining whether competing practical and theoretical approaches to a particular discipline are potentially paradigmatic. These are more subjective than the articulation of precise disciplinary exemplars, but are all consistent with Kuhn's position in SSR. Finding evidence that each of these criteria or indicators is present in the attitude of the academy, the legal profession, policy makers and funding providers to therapeutic jurisprudence is not difficult.

### **5.3.1 Professional Organisations That Give Legitimacy to the Paradigm**

Peak professional bodies such as the American Bar Association (ABA) and the Australasian Institute of Judicial Administration (AIJA) readily promote therapeutic jurisprudence as a valid and valuable component of contemporary legal practice. The Australasian Therapeutic Jurisprudence Clearinghouse is a resource for lawyers and judges sponsored by the AIJA. The AIJA acknowledges that:

Therapeutic jurisprudence is one of the most significant developments in the justice system. It [has] wide-ranging implications for judging, legal practice, court administration, corrections, legal institutions and processes generally and for legal and judicial education.<sup>106</sup>

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*and Indigenous Affairs* [2003] 199 ALR 604, (2003) 173 FLR 360; *Director of Public Prosecutions v Deon Lee Uren* (2003) VSCA 208.

<sup>105</sup> ML Handa, 'Peace Paradigm: Transcending Liberal and Marxian Paradigms' (Paper presented at the International Symposium on Science, Technology and Development, New Delhi, India, 20–25 March 1986).

<sup>106</sup> <<http://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse?task=view&id=206>>. The Institute provides that '[t]he aim of the clearinghouse is to promote the exchange of information concerning therapeutic jurisprudence and its application and development within Australasia'.



The ABA is quite active in ventilating and disseminating therapeutic jurisprudence perspectives, especially through its journal and in the work of its various committees.<sup>107</sup>

### 5.3.2 Dynamic Leaders Who Introduce and Purport the Paradigm

There are readily identifiable community leaders in the development of and advocacy for therapeutic jurisprudence. These researchers and advocates regularly arrange national and international therapeutic jurisprudence conferences, special editions of journals, internet-based discussion groups, training programs for lawyers and judges and advice for those developing law school curricula. Many are also involved in continuing legal and judicial practice. Most of these have been previously identified in the thesis. Some of the most active and prolific include: Professor David Wexler (Distinguished Research Professor Emeritus of Law, James E Rogers College of Law at the University of Arizona),<sup>108</sup> Professor Arie Freiberg (former Dean of the Faculty of Law at Monash University),<sup>109</sup> Judge Peggy Fulton Hora (former Judge of the California Superior Court and one of the founders of the drug treatment courts in the US)<sup>110</sup> and Dr Michael King (Magistrate at the Magistrates' Court of

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<sup>107</sup> A partial list of the ABA Journal papers on therapeutic jurisprudence can be located at <[http://search.americanbar.org/search?q=therapeutic+jurisprudence&client=default\\_frontend&proxystylesheet=default\\_frontend&site=default\\_collection&output=xml\\_no\\_dtd&oe=UTF-8&ie=UTF-8&ud=1](http://search.americanbar.org/search?q=therapeutic+jurisprudence&client=default_frontend&proxystylesheet=default_frontend&site=default_collection&output=xml_no_dtd&oe=UTF-8&ie=UTF-8&ud=1)>. As an example of the influence of therapeutic jurisprudence at the committee level, see the report 'American Bar Association's Commission on Effective Criminal Sanctions Within the Criminal Justice Section', *National Legal Aid and Defender Association* <<http://meetings.americanbar.org/webupload/commupload/CR209800/newsletterpubs/Report.V.PDF.121306.pdf>>.

<sup>108</sup> <[http://en.wikipedia.org/wiki/David\\_Wexler](http://en.wikipedia.org/wiki/David_Wexler)>; <<http://www.law.arizona.edu/faculty/getprofile.cfm?facultyid=91>>.

<sup>109</sup> <[http://en.wikipedia.org/wiki/Arie\\_Freiberg](http://en.wikipedia.org/wiki/Arie_Freiberg)>; <<http://www.monash.edu.au/research/profiles/profile.html?sid=5815&pid=3804>>.

<sup>110</sup> <<http://www.judgehora.com/>>; <<http://www.linkedin.com/pub/peggy-hora/4/864/946>>

Western Australia and Adjunct Senior Lecturer at the Faculty of Law, Monash University).<sup>111</sup>

As discussed previously, problem-solving courts and some other therapeutic jurisprudence-aligned projects are tolerated and generally seen as ‘special’ rather than revolutionary. However, the status of those leading practitioners operating according to a new paradigm is also important. Even idiosyncrasies of background and personality can play an influential role—and the status of those proposing the new paradigm can be critical to the rate of conversion.<sup>112</sup>

### **5.3.3 Journals and Editors Who Write About the System of Thought and Disseminate the Information Essential to the Paradigm and Give the Paradigm Legitimacy**

The bibliography service at the International Therapeutic Jurisprudence Network lists citation details for hundreds of peer-reviewed papers dealing with therapeutic jurisprudence.<sup>113</sup> At least two journals have sections devoted to therapeutic jurisprudence papers in their regular issues.<sup>114</sup> Key

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<sup>111</sup> <<http://au.linkedin.com/pub/michael-king/39/420/37a>>; <<http://www.law.monash.edu.au/staff/mking.html>>.

<sup>112</sup> A notorious example of this is that of Lord Rayleigh (John William Strutt), who won a Nobel Prize for discovering the inert gas argon. His name was accidentally left off a paper submitted to the British Association for the Advancement of Science in 1924. The editors and reviewers rejected the paper, labelling it as ‘the work of one of those curious persons called paradoxers’. Once Rayleigh’s name was added, the paper was immediately published. Merton (writing of the sociological equivalent) calls this phenomenon ‘the Matthew Effect’, by which the higher the academic or professional status of a person attempting to make an important or unorthodox contribution, the less likely it will be listened to: Robert Merton, ‘The Mathew Effect in Science’ (1968) 159(3810) *Science* 56–63. ‘For to all those who have, more will be given, and they will have an abundance; but from those who have nothing, even what they have will be taken away’: Matthew 25:29, *New Testament: New Revised Standard Version*.

<sup>113</sup> <<http://www.law.arizona.edu/depts/upr-intj/>>.

<sup>114</sup> *Florida Coastal Law Review* <<http://www.fcsl.edu/law-review>>; *Revista Juridica UPR* <<http://www.revistajuridicaupr.org/>>.

therapeutic jurisprudence advocates and practitioners appear on the editorial boards of a wide range of law and mental health journals.<sup>115</sup> As yet, there does not appear to be a journal devoted solely to therapeutic jurisprudence. This does not necessarily weigh against paradigm status (especially given the existence of a reasonable number of journals that focus more generally on non-adversarial justice and the fact that therapeutic jurisprudence seeks to influence a wide range of legal rules and practices), but the appearance of unique journals and the development of a specialist vocabulary utilised by scholars and practitioners within those journals is a powerful Kuhnian criterion.

The absence of a unique therapeutic jurisprudence journal, especially given the depth and breadth of the coverage of the area in other, more general journals, could well turn out to be a litmus test for whether therapeutic jurisprudence survives as something more than a component of a wider non-adversarial paradigm. We could also posit that therapeutic jurisprudence is still very much in the early stages of developing disciplinary exemplars and, until this process is more advanced, the creation of a specialist journal could be counterproductive. There already seems to be an absence of express reference to discrete social science data in many therapeutic jurisprudence-aligned projects and publications and this may be an indication that a precise therapeutic jurisprudence methodology and set of exemplars are harder to identify. This is worth noting in the context of a movement that is strongly focused on extending its influence further into the legal mainstream.

#### **5.3.4 Government Agencies Who Give Credence to the Paradigm**

To some extent, identifying and positing evidence relevant to this criterion could be an exercise in cherry picking. Certainly, we see funding for a wide range of therapeutic jurisprudence inspired and aligned projects and innovations across jurisdictions and also for think tanks and professional

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<sup>115</sup> <<http://www.law.arizona.edu/faculty/getprofile.cfm?facultyid=91>>.

associations designed to support and resource non-adversarial approaches to legal practice, but the degree to which these are supported and funded varies considerably. The Australian experience seems to be that support for therapeutic jurisprudence initiatives (at least at a practical level) are closely linked to the ideological and policy fundamentals of particular governments. Some jurisdictions, such as Victoria, New South Wales and Western Australia, appear to be continuing a strong program of development in non-adversarial and therapeutic programs, whereas Queensland appears to be dismantling much of its recent progress. What does appear to be consistent with the criterion, however, is that governments and agencies are willing to trial and fund therapeutic jurisprudence initiatives. Further, even jurisdictions such as Queensland that have wound back some programs continue to support the efforts of individual practitioners and judicial officers to continue their application and development of therapeutic jurisprudence principles.<sup>116</sup>

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<sup>116</sup> The decision by the Queensland government to scrap the Murri Court, the Drug Court and the Special Circumstances Court on budgetary grounds has been widely criticised as both economically unjustified and socially irresponsible. The assertion is that the projected savings in running costs are nullified by the probable increase in costs of incarceration. The Attorney-General has claimed, however, that individual judges and magistrates will still be able to take advantage of existing sentencing legislation to deal with relevant offenders in more therapeutic ways. Without the funding to do this, that may be a naive assumption. There has been a long-standing problem in Queensland, for example, with the adequacy of payment for Aboriginal Elders asked to advise magistrates in Indigenous cases. See Stephen Smiley, 'Scrapping Qld's Murri Court Short Sighted', *ABC News Online*, 25 September 2012 <<http://www.abc.net.au/news/2012-09-25/scrapping-qld-murri-courts-short-sighted/4279700>>.

### 5.3.5 Educators Who Propagate the Paradigm's Ideas by Teaching It to Students

Winick has written <sup>117</sup> extensively on the relevance of therapeutic jurisprudence to modern legal education, especially in the US.<sup>118</sup> In 1995, responding to changes in admission requirements, he writes about how US law schools could comply with the new ABA standards for legal education that require law students to receive expanded professional and practical training. His view, which has proved to be accurate in light of subsequent curriculum offerings in some states, was that training students in therapeutic jurisprudence would be an ideal way of meeting those ABA standards but also of moving 'legal education into the modern era in a manner that will significantly increase the quality of lawyering and both client and professional satisfaction'.

Commenting on the influence of therapeutic jurisprudence in the law school curriculum, Wexler notes that:

The important point is to underscore the tremendous development of TJ during the last two decades; it has moved from a new twist on mental health law to a psychologically-sensitive approach to law in general; it has become truly interdisciplinary and international; it has moved from theory to practice and has become increasingly influential in professional formation, especially in legal education, as part of the curriculum and in law school clinics.<sup>119</sup>

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<sup>117</sup> Bruce Winick, 'Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards' (2005) 17(1) *St Thomas Law Review* 81.

<sup>118</sup> Some further examples in the Australian context are mentioned below. For further discussion in the Australian context, see also Michael King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129.

<sup>119</sup> Wexler, above n 31, 36.

### **5.3.6 Conferences Conducted That Are Devoted to Discussing Ideas Central to the Paradigm**

Major international conferences convened by scholars and practitioners involved in therapeutic jurisprudence are held approximately every two years.<sup>120</sup> Many others at a national, regional and local level are held. A survey of the schedules, topic clusters and range of the presenters indicates that these conferences tend to focus on both a deeper analysis of key theoretical and methodological issues within the field, but also an exceptionally wide range of evidence-based applications of therapeutic jurisprudence principles.

### **5.3.7 Media Coverage**

Media interest in therapeutic jurisprudence can often be traced to reports, investigations and editorials printed in relation to the operation of the specialist courts with which the movement is associated. Sometimes these reports are supportive of the movement and the particular courts or initiatives, and sometimes they are critical or sceptical. Often these reports can be linked to changes in government law and order policies. The decision to close both the Queensland Drug Court jurisdiction within the District Court of Queensland and the Murri Court in that same state, for example, attracted a flurry of coverage in both traditional media and social media.<sup>121</sup>

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<sup>120</sup> See, eg, 'Proceedings of the 3<sup>rd</sup> International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7–9 June 2006' <<http://www.aija.org.au/TherapJurisp06/Papers/>>. See also <<http://www.law.arizona.edu/depts/upr-intj/>>.

<sup>121</sup> See, eg, report and editorial of Tony Moore, 'Diversionary Courts Fall Victim to Funding', *The Brisbane Times*, 13 September 2012. In this piece, the author reports that the Newman government will no longer fund the Murri, Special Circumstances and the Drug courts, despite the 'outcry from community legal groups and the Queensland Law Society'. The Queensland Attorney-General had claimed that these courts and lists were not achieving their goals of reducing recidivism rates and were uneconomical, despite significant evidence to the contrary from the courts' own Annual Reports and the findings

### **5.3.8 Lay Groups, or Groups Based Around the Concerns of Lay Persons, That Embrace the Beliefs Central to the Paradigm**

Community support groups motivated by principles of non-adversarial justice, particularly those embraced by restorative justice and therapeutic jurisprudence, are not difficult to locate. This is unsurprising given that support groups are generally more concerned with the well-being of particular persons or groups of people and court participants than the substantive law itself. We could expect such groups to be at least receptive to the principles of therapeutic jurisprudence and it is only this level of engagement that seems required by the criterion. Victims of crime groups, homicide support groups and rape and crisis support groups are common.<sup>122</sup> However, increasingly, focus is being placed on other participants within the justice system. Significant attention is given in Australia to the psychological and emotional well-being of both lawyers and law students.<sup>123</sup>

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of various research evaluations. The willingness of investigative journalists to look for the detail in relation to therapeutic jurisprudence type initiatives is evidence of more than a cursory interest in non-adversarial legal processes and initiatives.

<sup>122</sup> The Victims of Crime Reference Group convened by the Department of Justice, for example, links to a Homicide Victims Support Group, Angel Hands (for victims of other serious violent crimes), The Compassionate Friends (a bereavement and support information centre for families who have experienced the death of a son, daughter, sister, brother or grandchild) and The Kids Help Line.

<sup>123</sup> See, eg, the 'wellness' sessions offered to law students at Monash University: <<http://monashlss.com/jd/wellness-sessions>>. Also RM Field and J Duffy, 'Law Student Psychological Distress, Adr And Sweet-Minded, Sweet-Eyed Hope' (2012) *Australasian Dispute Resolution Journal* 195–203; R Field and J Duffy, 'Better to Light a Single Candle Than to Curse the Darkness: Promoting Law Student Well-Being Through a First Year Law Subject' (2012) *Queensland University of Technology Law and Justice Journal* 133–56.

### 5.3.9 Sources of Funding to Further Research on the Paradigm

Institutional resourcing for therapeutic jurisprudence, both academic and judicial, appears to be strong. This includes funding provided both for discrete therapeutic jurisprudence initiatives and research projects and for non-adversarial agendas with therapeutic jurisprudence components.<sup>124</sup>

The second justification for Kuhnian paradigm status is that juristic thought obviously does seem to have some of the same qualities as scientific and social scientific thought. Jurists, legal academics and others make use of the scientific method as one means of testing the truth of assumptions and hypotheses and of a wide range of methods borrowed from the social sciences. Traditional legal research is often said to be based on the 'doctrinal' method. Given its concern with analytical statements and substantive statements of the law as its data rather than with the social facts that inform the methods of the social sciences, we might be surprised to find that this is so. However, collaboration and interdisciplinary research and practice have, as seen in Chapter 3, begun to infiltrate and influence legal scholarship from as far back as the beginning of the 20<sup>th</sup> century. The claim that the practice of law is exclusively governed by rules that derive their normative force from the authority/sovereignty of their source rather than from the theoretical perspectives or from experience and engagement with wider social mores and values is surely far less

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<sup>124</sup> For example, the author of this thesis was a Chief Investigator on a recent federally funded research project that enabled a team of interdisciplinary researchers across Australia to investigate public attitudes to sentencing and (in part) public willingness to embrace therapeutic alternatives to incarceration: Project ID DP0878042, 'Sentencing and Public Confidence: Public Perceptions and the Role of the Public in Sentencing Practice and Policy'. Research team: A/Prof G Mackenzie, Dr D Indermaur, Prof RG Broadhurst, Prof CA Warner, Dr L Roberts, Mr N Stobbs. The team's proposal and application for funding highlighted the fact that '[t]hus far, Australian legislatures have only tentatively responded to opportunities for sentencing reform based on therapeutic jurisprudence' and indicated that 'the design and implementation of each phase of the project is based on sound theoretical bases in both therapeutic jurisprudence and critical criminology'.



imperative today than at any time in the history of the common law. Academic lawyers have long been aware that in order to retain funding and relevance, the profession needs to expressly embrace a wider method. Hutchinson and Duncan observe that:

If we accept that law has a paradigm according to Kuhn's definition, is a distinct area of scholarship, and that juristic thought in particular makes up part of that discrete and credible paradigm, then it makes sense that law would have its own unique research method. But therein lies an anomaly for legal researchers. Operate within the intuitive and arcane doctrinal paradigm and you are being vague according to funding providers, operate outside it and you are not being a lawyer according to the profession.<sup>125</sup>

The third justification for Kuhnian paradigm status is that we can validly ask whether juristic thought in general is at a pre-paradigmatic or paradigmatic stage.<sup>126</sup> Given the conclusions of Chapter 4, the assertion is that the legal system is operating pursuant to an adversarial paradigm and, therefore, open to challenges from other potential paradigms.

Although necessary, the mere presence of the therapeutic jurisprudence paradigm within the mainstream practice of lawyering and judging is not sufficient for a therapeutic jurisprudence transformation of law. Such a transformation requires the articulation of arguments and positions challenging the core of legal theory and praxis; positions inconsistent with the dominant paradigm. Inconsistency between dominant and emerging scientific paradigms is, according to Kuhn, one of the *sine qua non*<sup>127</sup> conditions for the accomplishment of scientific revolutions. We need to ask whether therapeutic jurisprudence is in fact being advanced in this way. Is

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<sup>125</sup> Terry Hutchinson and Nigel Duncan, 'Defining And Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 84. The authors acknowledge in that paper that their argument is to some extent influenced by the analysis undertaken in this thesis.

<sup>126</sup> This is according to CM Campbell, 'Legal Thought and Juristic Values' (1974) 1(1) *British Journal of Law and Society*, 18; also V Aubert, 'The Structure of Legal Thinking' in J Andenaes et al (eds) *Legal Essays: A Tribute to Frede Castberg* (1963) 41, 50.

<sup>127</sup> An essential and indispensable condition precedent.

it capturing the legal and scholarly imagination as a potential juristic game changer?

The analysis above indicates that there is significant evidence to posit therapeutic jurisprudence as a paradigm for a juristic model across a range of ontological contexts. There is no guarantee that any particular innovative theory or practice will achieve paradigm status, since what is fundamentally required is the development of a dominant practitioner mind-set and disciplinary matrix rather than a set of empirical data or a certain level of falsification. Further, to the extent the therapeutic jurisprudence challenges the dominant legal paradigm, it is likely to be resisted by the mainstream. The depth of that resistance will also afford some insight as to its status as a potentially transformative paradigm. As will be discussed in Chapter 6, there is evidence that therapeutic jurisprudence's main critics (especially those based in the US) do indeed see it as a force that undermines or challenges some of the most fundamental tenets of the common law legal systems.

The question of to what extent therapeutic jurisprudence is articulating in depth, potentially revolutionising critiques of law and legal thought rather than simply informing discrete, incremental changes (small enough not to threaten the ruling adversarial paradigm and perhaps to be seen as statistical anomalies) is beginning to resolve, but a clearer answer emerges after a discussion regarding the current level of incommensurability between adversarialism and therapeutic jurisprudence.

## **5.4 Conclusion**

Reasonable arguments can be made, and evidence can be found, to support claims that therapeutic jurisprudence may constitute a Kuhnian paradigm in any of the three ontological categories examined in this

chapter (that is, as a distinct juristic model, as part of a wider therapeutic or non-adversarial paradigm or as a discrete problem-solving paradigm).

Although there was some evidence that a certain (albeit narrow) element within the therapeutic jurisprudence community see the movement as capable of comprising a complete juristic model, the weight of practitioner views is that the real significance and potential of therapeutic jurisprudence is, and will continue to be, on influencing the law in a more targeted way. Certainly the drive to mainstream therapeutic jurisprudence seems to be more about adding to the existing set of disciplinary exemplars, and refining some of those already in existence, than providing a definitive set of exemplars.

A large survey of US trial judges (n=1019) in 2007 by the Centre for Court Innovation<sup>128</sup> found that most mainstream trial judges in the US have attitudes that are consistent with the key principles of problem-solving justice (as identified by Hora 2011).<sup>129</sup> Many of these judges currently engage in practices that are typical of those found in problem-solving courts. There can be little doubt that these practices have evolved in response to the seemingly intractable problems of recidivism and the tenacious links between social disadvantage and psychological dysfunction, on the one hand, and criminal offending, on the other. Hora goes so far as to say that if we were to see the widespread adoption of principles such as those contained on the bench guides (she refers to those labelled 'Effective Outcome Judging'), then courts of the future may look more like those in an inquisitorial system than in an adversarial one.<sup>130</sup>

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<sup>128</sup> D Farole and M Rempel, 'Problem-Solving and the American Bench: A National Survey of Trial Court Judges' (2008) 3 *Centre for Court Innovation*.

<sup>129</sup> P Hora, 'Courting New Solutions Suing Problem Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Toolkits' (2011) 2(1) *Chapman Journal of Criminal Justice* 7.

<sup>130</sup> *Ibid* 35.

The perception among judicial officers that therapeutic jurisprudence can solve disciplinary problems in the Kuhnian sense (rather than simply solve puzzles) is not limited to the US. The drug sentencing program in Tasmanian courts, which is based on procedures in drug courts in other jurisdictions, has led the Chief Magistrate for Tasmania to claim that:

I must say from a judicial officer's point of view these can be very satisfying courts in which to sit. One sees improvements in health, the gaining of jobs and in one case a successful year at the University of Tasmania by one participant. I think of all the sentencing options available in the Magistrates Courts this program can be seen to be working in some cases.<sup>131</sup>

As discussed in Chapter 3, the academic and conceptual trend of recent decades, in the history of science as well as discipline-specific histories and theoretical foci such as jurisprudence, has been away from grand narratives that seek to integrate theory, method, social organisation within a field, disciplinary politics and worldview into some neat and digestible explanation. The drive to modernity brought with it all sorts of attractive claims about an ordered and ever more logical scientific method that has revolutionised the way practitioners in all disciplines work. However, increasingly, the evolution of disciplines, including law, is focused on more openness to innovation and the trialling of practical solutions to perennial problems that diverge from the orthodoxy of prevailing worldviews.

This explains, it can be argued, the survival of therapeutic jurisprudence across a number of decades and the perceived willingness of those within and without the discipline to give it room to expand. It seems reasonable, based on the discussion so far in this thesis, that the role of the judge as a neutral arbiter in the specialist courts has become not just malleable but in most cases secondary to that of a transformational leader of a treatment team.<sup>132</sup> There is a clear and urgent need, therefore, to examine the extent

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<sup>131</sup> Michael Hill, Chief Magistrate, Tasmania, 'Wandering Down the Therapeutic Jurisprudence Road' (2012) 20(2) *Australian Law Librarian*.

<sup>132</sup> The extent to which this may be at odds with the claims of Sir Anthony Mason and others that neutral adjudication must always be the 'main game' in a constitutional court is

of the conceptual and practical tension between these judicial roles and perspectives. The method for conducting such an examination, according to Kuhn, is via a consideration of incommensurability.

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obvious and will be discussed further in Chapter 6. Recall his assertion that '[c]ourts are courts; they are not general service providers who cater for "clients" or "customers" rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their "clients" and their "customers" will regard them, correctly in my view, as something inferior to a court': Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th Annual AIJA Conference, Adelaide, Spring 1999) 5 <<http://www.aija.org.au/online/mason.rtf>>.

# **Chapter 6**

## **The Nature and Implications of Incommensurability Between Adversarialism and Therapeutic Jurisprudence**

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### **6.1 Introduction—Incommensurability and Leaps of Faith**

This chapter argues that therapeutic jurisprudence and adversarialism are incommensurable paradigms in the Kuhnian sense. It explores, in more depth, what the nature and the consequences of that incommensurability are, and how they are manifest in the roles of judges and legal practitioners within the problem-solving courts. Finally, it considers whether such incommensurability is resolving itself, or is likely to resolve itself, via a paradigm shift from adversarialism to a post-adversarial paradigm that includes therapeutic jurisprudence exemplars.

A strong Kuhnian position on the effect of incommensurability would hold that advocates for competing juristic paradigms cannot fully comprehend the other's perspective because they are observing elements of a literally different phenomenological and social world (which are contingent upon

their worldview, training and experience) and describing them in a different professional language.<sup>1</sup> This is Kuhn's original position on incommensurability as set down in SSR (as explained in Chapter 3).

I characterise this as a strong position in the sense that it seems to preclude a meaningful dialogue between proponents of competing paradigms within a given discipline. If this were literally true, disciplines could well become mired in a conceptual and practical paralysis, in which no progress could be made without some leap of faith on the part of those practitioners aligned with whichever paradigm was in decline as the result of the requisite crisis. Yet history does provide clear and powerful examples of how disciplines can make such leaps of faith and avoid paralysis. Thus, while the strong sense of incommensurability is

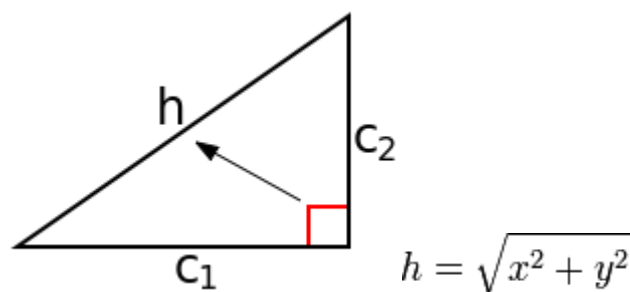
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<sup>1</sup> This is a phenomenon with a long pedigree in linguistics. There is a body of research that suggests that certain analytical or cognitive concepts (and perhaps even some emotions) are unique to particular cultures due to the uniqueness of their language and grammatical lexicon. The argument is, in its simplest form, that where two cultures do not share a common language, it may be impossible for the members of one of them to fully share in the experienced and felt world of the other. This is part of the wider communicative context in which '[m]eaning is determined in part by: who the author was, the purpose of the communication, for whom the information was intended, the relationship between the author and the audience, the culture within which the information was generated, the degree of commonality between source and receptor': Mildred L Larson, *This means-based Translation; A Guide to Cross-language Equivalence* (1984) 141.

According to one major study of this phenomenon: 'The worldview implicitly held by the author and that of the audience can call for special attention. Information from another culture assuming the value of authority structures runs the risk of appearing meaningless': 'Review of Frameworks for the Representation of Alternative Conceptual Orderings as Determined by Cultural and Linguistic Contexts' in Mildred Larson et al (eds) *Project on Information Overload and Information Underuse (IOIU) of the Global Learning Division of the United Nations University* (1986). The authors give the following example: 'In Melanesia there is a fundamental recognition of the network of powers influencing a person. This would render information from other cultures of limited significance unless the relationship to such powers was made clear. To render information meaningful in Japanese, distinctions of social status must be rendered explicit, even though they may not be present in the original form of the information'.

conceptually defensible, its actual effects in the practical world are at a more nuanced level. This is, as we shall see, consistent with Kuhn's views on incommensurability.<sup>2</sup>

An early, but powerful, illustration of this phenomenon of strong incommensurability between paradigms was the Pythagorean extension of mathematics to cater for irrational numbers.<sup>3</sup> Greek mathematicians held it to be axiomatic that all magnitudes of the same kind were commensurable (that is, measureable by reference to the same standard or units). All lengths, for instance, were assumed to be multiples of some common unit. We could assert, according to this view, that any physical object can be ascribed a length in terms of a precise number of millimetres. Pythagoras was able to demonstrate, however, that there existed some lengths that could not be precisely quantified by reference to any existing units of measure, regardless of the precision of any measuring device or of any method of calculation. The hypotenuse of a right-angled triangle, he showed, can be calculated if we know the length of the other two sides. This is done by finding the sum of the squares of these two other lengths and then finding the square root of that total. However, unless the sum of the other lengths is a perfect square (for example, 4, 9, 16 and 25), then the square root will be irrational—that is, it cannot be precisely expressed in terms of ordinary, rational numbers.



**Figure 6.1: Pythagoras' right-angled triangle**

<sup>2</sup> As articulated in the SSR postscript.

<sup>3</sup> This is not to assert that adversarialism and therapeutic jurisprudence are competing paradigms at the same ontological level as pre- and post-Pythagorean mathematics.



This means, effectively, that we can express the length of the diagonal of many squares as a *function* of some rational number (for example,  $\sqrt{2}$ ) but not as a rational number. Since a number cannot be both rational and irrational, these sets of numbers are incommensurable; that is, they lack a common unit of measurement by which we can compare them. In other words, there exists some lengths (the irrationals) that cannot be expressed by rational integers, despite the fact that these lengths obviously 'exist'.

Both rational and irrational numbers exist in the sense that they can refer to phenomena in the observable world. I have five fingers (an amount expressible as a rational integer), but there also exists many objects whose lengths are irrational. The immediate consequence of Pythagoras' theorem is that the diagonal of any square is incommensurable with its side—meaning that their ratio is not a rational number, that there is no unit of which they are both integral multiples, despite the fact that both the sides and diagonals of a square are extant physical properties that are readily apparent to an observer. The existing language of mathematics (before the Pythagorean conception of irrationality) was not able to describe this mathematical relationship, yet the relationship could not be denied—all triangles have sides and diagonals.

Despite proving that there were numbers that were irrational in this sense, the development of pure and applied mathematics did not come to an *impasse*. The Greeks took it as a matter of faith (albeit a *faith grounded in a symbolic proof*)<sup>4</sup> that these numbers existed and expressed them in a new mathematical language that subsumed that which already existed. A new mathematical paradigm emerged,<sup>5</sup> which would eventually assert that

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<sup>4</sup> A discussion of the proofs and of the nature and effect of the Pythagorean and Euclidean incommensurability is thoroughly dealt with in WR Knorr, *The Evolution of the Euclidean Elements: A Study of the Theory of Incommensurable Magnitudes and Its Significance for Early Greek Geometry* (1975).

<sup>5</sup> Note that the paradigm that emerged was new, and resulted in a paradigm shift, due to its insertion of new exemplars in the core of the disciplinary matrix. Virtually all of the

there are more irrational numbers than rational numbers and that we can utilise purely imaginary numbers (such as the square root of a negative number) in order to make calculations about real world observations and phenomena. The potentially paralysing effects of this incommensurability was resolved by the willingness of (most) mathematicians to add exemplars of irrationality and complexity to the disciplinary core. In other words, by a shift in paradigm.

This chapter considers whether this sort of incommensurability is a feature of the relationship between adversarialism and therapeutic jurisprudence, and if so, whether it can be reconciled, or perhaps is being reconciled, at a practical level. It concludes that although there is indeed some evidence of strong incommensurability between the two, this is neither a barrier to effective professional dialogue nor a threat to the continued relevance of either.

## **6.2 A Deeper Analysis of the Parameters of Incommensurability**

According to Kuhn, advocates for different paradigms see the world in a different way because of their professional and academic training and prior experience as practitioners after being socialised into the profession.<sup>6</sup> In other words, they have been imbued with a sense of faith in their respective paradigms. They generally do not see their field as being characterised by a set of historical paradigms at all, let alone as being subject to any revolutions.<sup>7</sup>

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existing exemplars and disciplinary matrix were left untouched. The 'shift' represents the extent to which the incommensurability is reconciled and resolved.

<sup>6</sup> The pioneering advocates within a given paradigm will not have been socialised into the profession or discipline in this way but will have been those who first resolved problems that emerged within the disciplinary crisis afflicting the previous paradigm.

<sup>7</sup> SSR 138–9. Kuhn refers to 'a persistent tendency to make the history of science look linear or cumulative, a tendency that even affects scientists looking back at their own

Being committed to some different (newer) exemplars, they have different ideas about the importance of solving various problems and, more importantly, about the standards that a solution should satisfy. They subscribe to some different conceptual networks in order to inform these standards, hence the vocabulary and problem-solving methods that each use tend to differ. Most of the existing professional vocabulary remains, but the newer exemplars are usually articulated with new terms.<sup>8</sup> The adherents of a new paradigm are likely to have been schooled in its worldview, methodology and language. They and their new paradigm prevail, as adherents of the older paradigm convert, retire or expire.

This is not to suggest, as did Kuhn's main critic, Imre Lakatos, that a practitioner could not work simultaneously on two research projects, each ostensibly situated within opposed and incommensurable paradigms. There is a sense in which incommensurability is more a function of language structures than of any necessary limitation of human cognition. Even if we were to grant that therapeutic jurisprudence and adversarialism were incommensurable in the strongest sense suggested by Kuhn, we ought to have no real difficulty in accepting that legal practitioners can, and often do, work simultaneously on matters with procedures and exemplars grounded in either one these paradigms. A drug court judge may act in the problem-solving role that jurisdiction requires on one day and then as a mainstream adversarial trial judge the next without any apparent difficulty. The *practice* of one does not exclude practice of the other.<sup>9</sup>

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research ... there is a reorientation toward the field that taught practitioners to ask new questions about, and to draw new conclusions from, old data'.

<sup>8</sup> Such as the central therapeutic jurisprudence concepts of 'therapeutic' and 'anti-therapeutic'. The words themselves may not be an addition to the English language, but they have a new and specific meaning in the lexicon of the law.

<sup>9</sup> The stronger epistemic argument that incommensurability, if real, prevents the conclusion that change or conversion from one paradigm can ever be rational (also proposed by Lakatos) can be credibly defended, but would be a distraction here. See, however, Robert Miner, 'Lakatos and MacIntyre on Incommensurability and the

However, there can be only one controlling paradigm at any time (for any particular ontological comparison), so if we were to posit adversarialism and therapeutic jurisprudence as distinct juristic models, either the adversarial role subsumes the therapeutic role, or both must be subsumed by a larger (and then post-adversarial) paradigm. The conceptual alternative being that the official presiding over the drug court on one day and then over the mainstream court the next day is only presiding as a judge on one of the days. Kuhn provides for the following crucial caveats to the effects of strong incommensurability:

1. Practitioners who experience a conversion from one paradigm to the other can communicate, to some extent, with those committed to either paradigm—and,
2. There is some process or set of holistic benchmarks external to individual paradigms by which they can be validated or invalidated (at least in terms of their claims *to be a paradigm*) and we need not be chained to the claim that any particular paradigm can only be right<sup>10</sup> according to some criteria unique to that paradigm, or wrong according to criteria unique to one of its rival paradigms.<sup>11</sup>

However, debate between advocates of incommensurable paradigms is rarely couched in terms of these holistic, meta benchmarks and circularity tends to characterise the discourse of such debates.<sup>12</sup> There are sound analytical reasons for why such circularity is perhaps conceptually inevitable and therefore of practical importance to advocates of new paradigms.

An illustration of how attempts to comparatively evaluate paradigms, from the perspective of either one or the other of them, leads to circularity and

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Rationality of Theory-change' (Paper presented to the 20<sup>th</sup> World Congress of Philosophy, Boston, Massachusetts, 10–15 August, 1998).

<sup>10</sup> 'Right' is not a very useful label for a paradigm.

<sup>11</sup> See generally SSR postscript.

<sup>12</sup> The judicial critics of therapeutic jurisprudence and the operation of the drug courts, for example, inevitably respond to innovations in terms of breaches of core adversarial exemplars such as due process.

analytical dead-ends is provided by Dworkin's critique of the traditional debate around the connections between law and morality. Both of these normative contexts provide exemplars for the resolution of social problems and disputes, but it is difficult (and perhaps impossible) to evaluate one in the language of the other.

Let us grant, for argument's sake, that law and morality can both provide paradigms for the regulation of human social interaction. What then is the relationship between these two paradigms? Dworkin<sup>13</sup> identifies what he claims to be a fatal, and unavoidable, flaw in the usual approach to assessing the connections between law and morality. Law it is said, constitutes a separate and distinct set of norms to that set constituting morality. Given that, how far should we allow morality to inform what the law ought to be or how it ought to be applied? This is a common enough question if we consider the political and cultural debates that surround the moral value of certain legal rules (such as those that criminalise abortion or proscribe marriage between same sex couples.) How ought a judge to proceed when asked to apply a law that he or she finds to be morally repugnant?

The usual way of approaching this question is to adopt one of two positions. First, a positivist approach that holds that law and morality are completely independent sets of norms. What constitutes the law is absolutely determined in a historic sense—it depends on what the community in question has accepted as law (which will usually be a matter of examining the authority of the source that has posited the laws in question, such as a legislature or an appellate court). If an apparently unjust law complies with what the relevant community accept as law, then it is still, unquestionably, a law. It may not be a 'good' law in some sense, but it is at least procedurally valid.

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<sup>13</sup> Ronald Dworkin, *Justice for Hedgehogs* (2011) 402.

An interpretist approach, conversely, does not accept that law and morality are totally independent sets of norms. Pursuant to this approach, the law includes not only those particular rules that have been enacted by the accepted source(s), but also ‘the principles that provide *the best moral justification* for those enacted rules’.

The flaw that Dworkin alleges in this two-systems picture is that it allows for no neutral perspective from which to adjudicate between these separate systems. He asks how we can resolve the question as to whether positivism or interpretivism is a better account of how the two systems relate. Is this, itself, a moral question or a legal question? If it is neither, can the question then ever be answered to the satisfaction of either the interpretist or the positivist?

If we treat the question as legal, he says, and then use legal resources such as legislation, case law and adversarial protocols (such as due process) to answer that question, then we cannot properly go about doing that unless we have a theory of how to read those legal resources. To have such a theory assumes that we have made a decision about what role morality plays in fixing the content of law (that is, which of those resources are actually going to count as law).<sup>14</sup> If we do not accept that, then we have ‘built positivism in from the start and must not feign surprise when positivism emerges at the end’.<sup>15</sup> Conversely, if we treat it as a moral question, we beg the question from the other perspective (by assuming that it is permissible to select the law for our analysis based on

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<sup>14</sup> Because of important juristic maxims such as ‘*lex injustia non est lex*’ (an unjust law is no law), a belief that has a long and entrenched history in jurisprudence, from St Augustine to Aquinas to John Finnis and Lon Fuller.

A tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of a law ... for all it has in the nature of a law consists in it being an ordinance made by a superior to his subjects, and aims at being obeyed by them.

Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province trans, 1948) 1002 [first published 1265–74].

<sup>15</sup> Dworkin, above n 13, 403.

some moral principles). To ask whether our system of morals ought to inform our system of laws already assumes that these two sets of norms are separate.

If we adopt this form of critique (suggested by Dworkin) of a two silos approach to the problem of reconciling legal and moral norms, to comment on a purported Kuhnian incommensurability of therapeutic jurisprudence and adversarialism, what we have is a similar circularity. Let us grant, for argument's sake, that therapeutic jurisprudence and adversarialism consist of two sets of distinct exemplars. We can then legitimately ask: how far ought we to allow the therapeutic exemplars to determine whether a particular law or legal process is valid?<sup>16</sup>

As in the Dworkin scenario, what counts as law from an adversarial perspective is an historical question—we simply ask whether any given law has been enacted by an authorised source and whether the relevant enactment procedure accords with constitutional requirements of due process. If it does, even though it might have disastrously anti-therapeutic consequences that far outweigh its otherwise demonstrable utility, then it is a valid law. If we do not object to that, then we have assumed that adversarialism will brook no objections.

Therapeutic jurisprudence does not, however, accept that law and therapy are independent sets of exemplars (norms). It would assert that the law consists of (or more properly 'ought to consist of') both the enacted rules and adversarially mandated processes, but also the modifications (recommended by evidence-based social science data) that allow those rules to continue to have their intended effect, while also minimising anti-therapeutic consequences.<sup>17</sup> If we then ask to what extent therapeutic

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<sup>16</sup> Most therapeutic jurisprudence scholars do not yet advocate that a law with anti-therapeutic consequences is invalid, but merely that recasting that law in order to remove the anti-therapeutic consequences would be preferable.

<sup>17</sup> Therapeutic jurisprudence generally does not purport to invalidate otherwise valid laws. However, it does advocate that there is scope for discretion in both the

jurisprudence exemplars ought to inform, modify or value-add to adversarial exemplars, we assume that such a question is valid and that there is a necessary therapeutic intervention in the adversarial system.

### 6.3 Softer Incommensurability—The Language of Difference and Exclusion

Circularity arises because of the construction, within the group subscribing to each paradigm, of what constitutes a valid question within the field or discipline. As noted in Chapter 2, Bachelard asserted that all questions that arise within a discipline are contingent upon some practitioner(s) recognising that a valid question exists in the first place. Validity is constructed and, therefore, dependent upon the worldview of the person asking it.

And, irrespective of what one might assume, in the life of a science, problems do not arise by themselves. It is precisely this that marks out a problem as being of the true scientific spirit: all knowledge is in response to a question. If there were no question, there would be no scientific knowledge. Nothing proceeds from itself. Nothing is given. All is constructed.<sup>18</sup>

The conceptual links between Bachelard's epistemic ruptures and Kuhn's paradigm shifts are clear and intended. We can reconcile Bachelard's claim that no disciplinary knowledge is *given* with Kuhn's assertion that paradigmatic exemplars are basically the *given* set of benchmarked disciplinary statements to which all other work in the discipline must accord. The paradigmatic exemplars do not proceed from themselves,

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interpretation and application of laws, which may amount to an extended statement of what that law 'is'.

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*Et, quoi qu'on en dise, dans la vie scientifique, les problèmes ne se posent pas d'eux-mêmes. C'est précisément ce sens du problème qui donne la marque du véritable esprit scientifique. Pour un esprit scientifique, toute connaissance est une réponse à une question. S'il n'y a pas eu de question, il ne peut y avoir de connaissance scientifique. Rien ne va de soi. Rien n'est donné. Tout est construit.*

Gaston Bachelard, *La formation de l'esprit scientifique* (1934).



they are not simply the result of observations of the world around us. The exemplars are constructed by, and accepted among, members of the discipline. It is this process of construction, and the paradigm-specific language that it generates, that gives rise to incommensurability, rather than any *intrinsic* properties of the exemplars themselves.<sup>19</sup>

Cognisant of the critical role played by language in the identification and evolution of disciplinary exemplars, we can identify a softening in the later work of Kuhn in respect to incommensurability. It becomes not so much an incommensurability (or mutual exclusivity) of content, but rather a problem of translation, and therefore, of a meaningful comparative discourse. As observed in Chapter 2, Kuhn eventually provided that two theories would be incommensurable where there is no '*language* into which at least the empirical consequences of both can be translated without loss or change'.<sup>20</sup> There can never be such a neutral observation language because:

[i]n the transition from one theory to the next, words change their meanings or conditions of applicability in subtle ways. Though most of the same signs are used before and after a revolution—e.g. force, mass, element, compound, cell—the ways in which some of them attach to nature has somehow changed.<sup>21</sup>

At the most general and definitive level, we can see that therapeutic jurisprudence practitioners and those who advocate for similar realignments of law do, indeed, demarcate their paradigms with apparently incommensurable vocabulary. The very commonly used descriptors of

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<sup>19</sup> The exemplars do have some crucial intrinsic properties, that is, their ability to solve problems that gave rise to the crisis within the discipline after a period of normal science. However, the incommensurability arises when an associated disciplinary language evolves around these solutions that excludes or significantly modifies the language of the older paradigm. In the Pythagorean example above, the terms 'rational' and 'irrational' describe incommensurable constructs.

<sup>20</sup> SSR 266. It is this notion of 'without loss or change' that is critical.

<sup>21</sup> Thomas Kuhn, 'Reflections on My Critics' in Imre Lakatos and Andrew Musgrave (eds), *Criticism and the Growth of Knowledge* (1970) 270.

*non*-adversarial justice<sup>22</sup> and *post*-adversarial justice seek to define an approach to law that, at least at the syntactical level, excludes the paramountcy of adversarialism. Even the less exclusionary label of *less adversarial proceedings*, referring to some processes in the Family Court, asserts and assumes that adversarial exemplars themselves are not unassailable, non-malleable or exclusive of other exemplars. The assertion that the proceedings of such a significant and entrenched jurisdiction, such as that exercised by the Family Court, is able to operate according to a paradigm in which adversarialism is not definitive illustrates the organic nature of paradigm vocabularies that Kuhn says ‘change their meanings or conditions of applicability in subtle ways’.

Fierce debates about the meaningfulness and validity of terminology arising within a new paradigm are a *sine qua non* during a period of disciplinary crisis.<sup>23</sup> It is hardly surprising, therefore, that some of the most trenchant criticism<sup>24</sup> of therapeutic jurisprudence relates to the alleged vagueness and arbitrariness of the terms ‘therapeutic’ and ‘anti-therapeutic’. In advocating for the complete elimination of therapeutic jurisprudence from the Family Court jurisdictions in the US, for example, Kates argues that the partisan assertion of adversarial counsel that a particular mental health expert’s recommendations or opinions would be the most ‘therapeutic’ in the circumstances of the case is often simply a self-serving attempt to portray their client’s side of the matter in the best light. Where counsel does not hold the professional belief that this is true, they act unethically, according to Kates.

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<sup>22</sup> In David Wexler’s foreword to the seminal book advocating for non-adversarial approaches to law within Australian jurisdictions—Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (2009), v—David Wexler notes that therapeutic jurisprudence has arisen as a response to, and reaction against the ‘argument culture, or ‘culture of critique’ that privileges the adversarial system as the paradigmatic method for resolving disputes.

<sup>23</sup> This means that it is a necessary and indicative sign that the crisis, is in fact, in crisis.

<sup>24</sup> Criticism here is used in a broad sense to include both pejorative critique and constructive critique.

In his trenchant criticism of the drug court jurisdictions in the US, Cohen argues that the strongest advocates for drug courts have a 'thoroughgoing contempt for traditional justice'.<sup>25</sup> He claims that they use the descriptor 'adversarial' to disparage the traditional court and that they mock the language of objective adjudications such as 'dispassionate, disinterested magistrate' as antiquated. His own characterisation of the drug court judge is, in turn, equally as disparaging when he asks whether judges should really play the role of 'confessor, cheerleader and mentor'. The roles and functions he describes in these ways are never pondered, he claims, due to the widespread 'euphoria over the drug court revolution'. In the therapeutic jurisprudence literature, the judge in a problem-solving court is often described as a coach or mentor for the offender. Another judicial critic argues that these terms are euphemisms for judges who are really just 'glorified probation officers'.<sup>26</sup>

Hoffmann claims that the roles of the judge and probation officer are mutually exclusive and that to blend them not only makes no practical sense (due to the different training required for each role) but because an attempt to blend violates basic notions of adversariness. This attitude acts to preclude a neutral, comparative language of observation and comparison that allows legitimacy to each perspective. One cannot, Hoffman implies, ask how much of a coach or a mentor a judge may legitimately be. Of course, if these labels and functions are denied to the judge working in the therapeutic jurisprudence role, then he or she cannot work in that role at all.

Hofmann and Cohen both also make strong criticisms of what they perceive to be the paternalistic nature of therapeutic jurisprudence reforms. The drug courts, they claim, characterise what they accomplish

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<sup>25</sup> Eric Cohen, 'The Drug Court Revolution: Do We Want Theory Rather Than Justice to Become the Basis of Our Legal System?', *The Weekly Standard*, 27 December 1999, 20.

<sup>26</sup> Morris B Hoffman, 'The Drug Court Scandal' (2000) June *North Carolina Law Review* 1477–529.

as an imposed solving of the offenders' problems for them. We ought not to be surprised to hear this sort of criticism levelled from within the context of a liberal worldview. However, therapeutic jurisprudence advocates dispute this assessment.<sup>27</sup> They say that much rests in the use of language. They admit that there can be a perception of paternalism in the use of phrases such as 'problem-solving' and suggest other language. According to King, 'TJ in itself is against paternalism. It stresses that paternalism and coercion are anti-therapeutic. This is clear in the writings of Winick and Wexler'.<sup>28</sup> King cautions against the tendency of language to misrepresent what therapeutic jurisprudence attempts to achieve in the ways in which the drug treatment courts are sometimes described:

But some have purported to be applying therapeutic jurisprudence in taking a paternalistic approach. Some drug courts (and some other problem-solving courts) can provide examples. By asserting that these courts solve defendants' problems they are explicitly taking a paternalistic approach ... Therapeutic jurisprudence does not assume the superiority of the lawyer (or judicial officer), but sees the client as the autonomous change or solution agent with the lawyer providing advice and support. It is only a corruption of the therapeutic jurisprudence approach that leads to the criticisms made.<sup>29</sup>

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<sup>27</sup> A very thorough analysis of the issue of autonomy in therapeutic jurisprudence practice is undertaken by Astrid Birgden, 'Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' (2009) 78(1) *Revista Jurídica de la Universidad de Puerto Rico* 43. See also Robert F Schopp, 'Therapeutic Jurisprudence: Integrated Enquiry and Instrumental Prescriptions' (1999) 17(5) *Behavior Sciences and the Law* 589, 595.

<sup>28</sup> In Adrian Evans and Michael King, 'Reflections on the Connection of Virtue Ethics to Therapeutic Jurisprudence' (2011) 35(3) *UNSW Law Journal* 717–22, citing Bruce Winick and David Wexler, *Judging in a Therapeutic Key* (2003); Bruce J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705. Winick has said that: 'Indeed, the existing body of therapeutic jurisprudence work is anything but paternalistic ... rather than defending government paternalism, [it] is animated by the insight that such paternalism is often anti-therapeutic, and that legal protection for individual autonomy can have positive therapeutic value'.

Bruce Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy and the Law* 192.

<sup>29</sup> David B Wexler and Michael S King, *Promoting Societal and Juridical Responsivity to Rehabilitation: The Role of Therapeutic Jurisprudence*, Arizona Legal Studies Discussion

Among both the advocates and critics of therapeutic jurisprudence, the two seminal conceptual and theoretical critiques of (or *apologia*<sup>30</sup> for) the movement are those of Roderick and Krumholz<sup>31</sup> and Slobogin,<sup>32</sup> respectively. Roderick and Krumholz suggest that therapeutic jurisprudence may not just be conceptually vague, but self-referential in a way reminiscent of the Dworkian critique of the conception of law and morality as sets of independent norms. They say:

It should be noted that defining TJ loosely so that it can lead to much empirical study may be tautological. We should not assume that TJ, as the study of how law, legal processes, and legal actors can have therapeutic or anti-therapeutic effects, allows us to jump to the statement that the law can function therapeutically. Are we defining TJ by the very thing it is hypothesized to explain?<sup>33</sup>

In identifying some of the key conceptual and empirical challenges faced by the therapeutic jurisprudence movement, Roderick and Krumholz do

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Paper No 10–46 (2011); Michael King, 'Should Problem Solving Courts be Solution-Focused Courts?' (2011) 80 *Revista Jurídica de la Universidad de Puerto Rico* 1005.

<sup>30</sup> 'Apology' being used here in the dialectic sense ascribed to the process of 'apologetics'. 'Apologetics' derives from the Greek *apologia*, which described the legal process of making a systematic theoretical defence of a position by assuming and advocating the key weaknesses or faults in the position as a means to suggesting how these faults can be repaired or reconciled (such as Plato's *Apology of Socrates*). A paradigmatic example is GH Hardy's 1940 essay *A Mathematician's Apology*, in which Hardy defends the value of the study of pure mathematics as being independent of any practical value that it generates. He argues, inter alia, that the 'uselessness' of pure maths meant it could not be used to create harm (at a time when applied mathematics was being used to produce formulae for the production of nuclear weapons). Available online at: <<http://archive.org/details/AMathematiciansApology>>. The Slobogin paper is widely recognised within the therapeutic jurisprudence movement as fulfilling this role to a certain extent.

<sup>31</sup> Dennis Roderick and Susan Krumholz, 'Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence' in MF Miquelon-Weismann (ed) *Trends and Issues in Scientific Evidence* (2007) vol 1, 201.

<sup>32</sup> Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy and the Law* 193.

<sup>33</sup> Wexler and King, above n 29, 207.

not represent the sort of paradigmatic resistance that is evident from Cohen, Kates or Hoffman (or from former High Court Chief Justice Anthony Mason that was examined in Chapter 5). In fact, they conclude that if therapeutic jurisprudence can meet these challenges, it 'might have its greatest potential as a philosophy' and could 'significantly challenge the status quo'.<sup>34</sup>

Despite the tendency (discussed in Chapter 5) of some therapeutic jurisprudence scholars to deny that therapeutic jurisprudence constitutes a theoretical position,<sup>35</sup> let alone a school of jurisprudence, Slobogin warns that deliberate vagueness in constructing the language of therapeutic jurisprudence could leave it indistinguishable from other forms of jurisprudence, such as legal realism, law and economics or feminist jurisprudence:

At its broadest, *therapeutic* could simply mean beneficial, whereas *counter-* or *anti-therapeutic* could mean harmful. Defined in this way, however, the concept is indistinguishable from any other analytical process; all reform of the law and the legal system is meant to redress some type of harm or confer some type of benefit. Therapeutic jurisprudence would merely be another name for figuring out what is best.

If we were to suggest that therapeutic jurisprudence differs from these other analytical processes in that it promotes the use of social science data to detect and redress harm, then we can identify a body of literature

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<sup>34</sup> Ibid 221–2.

<sup>35</sup> However, given that some scholars suggest that it can legitimately claim theory status, see Astrid Birgden, 'Therapeutic Jurisprudence And Offender Rights: A Normative Stance Is Required' (2009) 78(1) *Revista Jurídica de la Universidad de Puerto Rico* 43; Nigel Stobbs, 'The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' (2011) 4(1) *Washington University Jurisprudence Review* 97; Ken Kress, 'Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory' (1999) 17(5) *Behavior Sciences and the Law* 555 (who describes therapeutic jurisprudence's normative context as a hybrid theory of consequentialist and deontological positions concerned with maximising well-being, autonomy and other right: at 14).

and critique that, similarly, questions whether sufficient rigour has been used to determine what sorts of such data may be used, and whether there is in fact a sound legal basis for its use.

Failure to adopt such rigour, according to some commentators, may lead to unfairness and uncertainty in judicial processes. Rathus asserts that the increasing trend of judges within the Family Court of Australia to take judicial notice of social science data when managing difficult cases with elements of substance abuse, domestic violence and interpersonal conflict means that these judges are necessarily selective in which data they access, choose to be informed by and apply.<sup>36</sup> Rathus highlights the potential dangers of judges referring to, and potentially perhaps relying on, what they perceive to be authoritative 'social science data' in a survey of some recent cases before the Family Court. She notes that:

[t]wo separate ... areas of social science are those addressing the impacts of shared parenting time and family violence ... research in these fields has changed considerably since the 1990s. There is now wide acceptance of a range of assumptions or concepts but some of the social science literature referred to by judges is highly specialised. Despite quite regular use of the literature at trial level and a growing jurisprudence regarding this at appellate level it is suggested that the cases continue to demonstrate a lack of clarity and consistency in approach.<sup>37</sup>

Roderick and Krumholz (citing Gerring) warn generally against the conflation of vague or colloquial definitions in social science at a much more general level.<sup>38</sup> Gerring argues that the process by which a concept is defined is just as important, in terms of how it is applied, as the content of the definition. He observes that authors and decision makers necessarily make lexical and semantic choices about how they phrase their views and assessments. We cannot communicate a concept to a

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<sup>36</sup> Zoe Rathus, 'A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making' (2012) 26(2) *Australian Journal of Family Law* 81.

<sup>37</sup> Rathus, above n 36, 94.

<sup>38</sup> John Gerring, 'What Makes a Concept Good? A Critical Framework for Understanding Concept Formation in the Social Sciences' (1999) 31 *Polity* 357, cited in Roderick and Krumholz, above n 31, 207.

literate audience without putting a label on the concept. This means, according to Gerring, that authors are engaged, whether they realise it or not, in a 'perpetual interpretive battle'.<sup>39</sup>

In an assertion strongly reminiscent of the Kuhnian ethos, Gerring then reminds us of Weber's claims that we (as researchers and academics) seek to comprehend reality through a perpetual reconstruction of social science concepts:

The history of the social sciences is a continuous process passing from the attempt to order reality analytically through the construction of concepts the dissolution of the analytical constructs so constructed through the shift and expansion of the scientific horizon and the reformulation anew of those concepts. The greatest advances in the sphere of social sciences are substantively tied up with the shift in practical cultural problems and take the guise of a critique of concept-construction.<sup>40</sup>

There is certainly evidence in the therapeutic jurisprudence literature of a 'reformulation anew' of some existing concepts (as was discussed in the previous chapter). If we grant, however, the sense of Gerring's observation that practitioners and researchers within an emerging paradigm 'make lexical and semantic choices about how they phrase their views and assessments', then it seems reasonable to suggest that they will build a lexicon that contains unique 'labels' to refer to what may be unique concepts.

The extent to which this unique lexicon gives rise to Kuhnian incommensurability is then likely to be best detected in the attitudes that the next generation of practitioners within that emerging paradigm view their lexicon, a phenomenon that will be considered further in the next section.<sup>41</sup>

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<sup>39</sup> Ibid 359.

<sup>40</sup> Max Weber, *The Methodology of the Social Sciences* (1949) 105–6.

<sup>41</sup> SSR 45.



## 6.4 Transference of the Constructed Vocabulary of the Paradigm

According to Kuhn, what distinguishes the topics of research and practice between paradigms is best illustrated by what is common to these topics within a given paradigm. Writing about his experiences as a science teacher, Kuhn said that he came to realise that what created and sustained the consensus within a discipline was what it taught and how it was taught.<sup>42</sup> Science teaching, he claimed, is mainly concerned with exemplary problems and definitive solutions that students are expected to apply to new or novel fact situations.<sup>43</sup> This is a process readily recognisable to legal academics, who are accustomed to drilling law students in the use of generic problem-solving methods (such as IRAC) until it becomes their prime directive.<sup>44</sup>

As discussed in Chapter 2, Kuhn's beliefs about how knowledge is transferred within a discipline (and especially to students) are based largely on an ostensive exploration of concepts. In this he reflects, and makes express reference to, the Wittgenstein tradition,<sup>45</sup> most clearly articulated in *Philosophical Investigations*. The philosophy of language for most of the age of modernity has held that concepts can be defined by identification of the set of necessary and sufficient properties that a particular object must have in order for it to be an instance of the concept so defined. Wittgenstein argued that, on the contrary, such definitions are

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<sup>42</sup> H Anderson, 'Learning by Ostension: Thomas Kuhn on Science Education' (2000) 9 *Science and Education* 91–106.

<sup>43</sup> As was noted in Chapter 2, Kuhn borrowed and extended the term from the word that describes the process students of Latin use to conjugate new verbs with which they are unfamiliar. They essentially match the endings of a known verb to new stems in order to conjugate. See, eg, Ethan Allan Andrews, *A Synopsis Of Latin Grammar: Comprising the Latin Paradigms, and the Principal Rules of Latin Etymology and Syntax* (2010).

<sup>44</sup> Issue-Rule-Application-Conclusion. A simplistic legal problem solving method, which assumes that all legal problems have a solution within the existing paradigm.

<sup>45</sup> SSR 44.

almost certainly impossible. Such lists of properties, he said, apply at most to subsets of objects that are instances of that concept.

It is probably impossible, for example, to list a set of necessary and sufficient properties that an object must have to qualify as an instance of the concept of 'a chair'. We can compile such lists of properties that are common to subsets of that concept (such as 'stool', 'couch' or 'car seat'), which then form a network that ultimately links them all, such as distinguishing facial features that might link members of a given human family. So, Wittgenstein asserts, objects or instances of a given concept may possess little more than a 'family resemblance'.<sup>46</sup> Such an analysis creates, when extended to the objects and concepts of scientific disciplines, an obvious tension with scientific realism, and for our purposes, with any attempt to definitively describe and delineate either adversarialism or any alternative paradigm of law that can be neatly packaged and transmitted between generations of lawyers.

Kuhn illustrated his position on the transmission and acquisition of sets of similar concepts by reference to a child learning to identify waterfowl.<sup>47</sup> The child is taught by an adult who is able to classify birds as waterfowl that certain birds are ducks, geese or swans by looking at examples of each bird. Although the child initially makes some mistakes in classifying birds into these subgroups, he eventually learns to classify any new bird pointed out to him into the same categories as the teacher. Kuhn points out the 'primary pedagogic tool is ostension'. Although a shared inductive process such as 'all swans are white' might be at play, he says, the process may be equivalent rather than identical for the adult and the child.

The critical feature of this similarity in how the teacher and student learn to classify, however, is that although both agree on the correct classification

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<sup>46</sup> H Anderson, 'Kuhn's Account of Family Resemblance: A Solution to the Problem of Wide-Open Texture', (2000) 52 *Erkenntnis* 313–37.

<sup>47</sup> Thomas Kuhn, 'Second Thoughts on Paradigms' (1974), in F Suppe (ed) *The Structure of Scientific Theories* (1977) 459–82.

of any new instance, they do not necessarily possess identical conceptual frameworks. Each may have some differences in the properties that they consider to be necessary or sufficient for inclusion in each subcategory, but these never clash in practice. For the learning process to be said to be successful, to the extent that it is an ostensive learning method, all that is needed is for the child to recognise a set of properties that allow an identical taxonomy to that of the teacher. Kuhn claimed that even advanced scientific concepts are acquired in the same ostensive context.

When the student is confronted with a previously unencountered puzzle in their professional work, they look for a way to see it as being like a previously encountered puzzle or within a category they have learned to construct during ostensive learning experiences. Kuhn concludes that:

[t]he resultant ability to see a variety of situations as like each other ... is, I think, the main thing a student acquires by doing exemplary problems.<sup>48</sup>

According to Wittgenstein, testing our beliefs in relation to a particular phenomenon or process only makes sense where the testing can be done against a background and framework of beliefs that are no longer open to testing. He claims that:

the questions that we raise and our doubts depend upon the fact that some of our propositions are exempt from doubt ... are, as it were, like hinges on which those turn.<sup>49</sup>

Unlike traditional epistemologists or philosophers of science, however, Wittgenstein does not hold that these foundational beliefs are unchanging or that they are logically necessary conditions for anything we want to purport as a belief 'about' any phenomena in our field of study. He claims that these foundational beliefs are analagous to the bed and banks of a stream that dictate the direction and dynamics of how the waters in the stream flow. These phsyical features of the stream erode and shift over time but, given that these proceses take a very long time, to the contemporary observer, they are static. What counts for the contemporary

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<sup>48</sup> SSR postscript 189.

<sup>49</sup> Ludwig Wittgenstein, *On Certainty* (Denis Paul and GEM Anscombe trans, 1972) 341.

observers (practitioners of a given discipline), however, is the indubitability of these physical features in practice—so ‘it belongs to the logic of our scientific investigations that certain things are in *deed* not doubted’.<sup>50</sup> Observational beliefs or hypotheses (or claims to knowledge) that dispute or discount these foundational beliefs are not, according to Wittgenstein, knowledge at all. Further, doubt about something only makes sense in the context of a framework that is itself not subject to any doubt. He asserts that ‘doubt itself presupposes certainty’.<sup>51</sup>

A paradigm is not, by analogy, open to doubt because it is composed of the exemplars that provide the frame of reference in which doubt (hypothesis testing) can occur. When a practitioner claims to know certain things within a discipline that operates pursuant to an extant paradigm (to merge the positions of Kuhn and Wittgenstein), they are ‘really enumerating a lot of empirical propositions which [they] affirm without special testing; propositions that is, which have a peculiar logical role in the system of our empirical propositions’.<sup>52</sup> This is a useful way to conceive of the nature of incommensurability, especially in relation to juristic paradigms. The practitioners within a given paradigm do not consider their exemplars to be in need of any special testing. They are *a priori* and given. The purported exemplars of some other asserted paradigm are, to these same practitioners, necessarily in need of special testing.

Hence the vociferous claims of Hoffman, Cohen and others above that the adjudicatory functions of judicial officers need no defence or special explanation, but that we must start with the assumption that non-adjudicatory roles are not permissible. Thus, from the perspective of the

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<sup>50</sup> Ibid 342.

<sup>51</sup> Ibid 115.

<sup>52</sup> Ibid 136.

language used by therapeutic jurisprudence advocates and critics, the foundations for an extant incommensurability are apparent.<sup>53</sup>

## 6.5 The Key Differences—Are They Paradigmatic?

If therapeutic jurisprudence constructs exemplars for legal practice that are different to those provided by adversarialism, then there are paradigmatic differences between the two, in the Kuhnian sense. This is so even if the therapeutic exemplar merely adds to or amends an existing adversarial exemplar. Thus, for example, adoption of a rule that prescribes that a core adversarial practice should be amended for therapeutic effect, where existing due process and legal rights are not compromised, would be to amend (and, therefore, change) an extant exemplar.

As observed in the previous chapter, therapeutic jurisprudence sees itself, first and foremost, as a practical and applied force. It also sees itself as developing processes and functions that are different, better and more effective than those that seem perennially unable to solve some fundamental weaknesses in the legal system. In his foreword to Winick and Wexler's classic volume on what it means to be a therapeutic jurisprudence practitioner (*Judging in a Therapeutic Key*), Dressel claims that the movement consists of practical contributions to an 'evolving

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<sup>53</sup> As discussed throughout the thesis, the most vociferous of the critics of the therapeutic jurisprudence-inspired fora such as the drug courts will not even allow these institutions are 'courts'. This is often based on the erroneous assumption that statutory due process is not observed in them. This has sparked some vigorous responses from those most closely associated with the problem-solving courts. Peggy Hora, in an email to the therapeutic jurisprudence email discussion group, observes that:

[The suggestion] that there are little or no rules governing the operation of the court here' is simply not accurate. There are numerous cases setting out the due process requirements for imposition of bail conditions such as alcohol and other drug testing, imposition of sanctions or termination from the program. There are rules regarding the nexus between probation conditions and the criminal conduct. I totally disagree with your statement that 'problem-solving courts are not truly courts at all.

Email from Peggy Hora to tjlist@googlegroups.com, 11 February 2013.

judicial role'.<sup>54</sup> Every generation has, according to Dressel, some judges who come to the conclusion that there are better ways to dispense justice, and that there must be more to the role of the judge than 'finding the truth and deciding between two positions'. He notes that judges in many jurisdictions are becoming problem solvers and that they are now less likely to hand over to someone else the questions of why in relation to behaviour.

Freiberg identifies the transformed role of the judge as the single most important difference between a problem-solving court and an adversarial court:

In problem-oriented courts ... in which the principles of therapeutic jurisprudence are employed, the role of the judicial officer is pivotal. Much turns on her or his personality, the depth of involvement in the case, the continuing supervision and the direct engagement with the defendant in court, rather than through legal counsel. Because the judge is no longer seen as an impartial arbitrator of the facts or a dispassionate and disinterested imposer of sentences, a considerable burden is placed on the holder of this position.<sup>55</sup>

At first blush, one could hardly conceive of functions more paradigmatically different to that of an adversarial judge as those related to an individual judge's 'personality' who is 'no longer seen as an impartial arbitrator'. The differences between traditional courts and problem-oriented court are summarised in the following table, often extracted in the therapeutic jurisprudence literature.<sup>56</sup> I have modified and added some fields to the table to reflect some of the most current trends and findings in

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<sup>54</sup> Bruce J Winick and David B Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) 1–6.

<sup>55</sup> Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (2009).

<sup>56</sup> Roger Warren, *Reengineering the Court Process* (1998), cited in Rottman and Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (1999) 240 *National Institute of Justice Journal* 12, 14. Also extracted in Winick and Wexler, above n 54. These authors cite the source for this table as Roger Warren, 'Reengineering the Court Process', Presentation to Great Lakes Court Summit, 24–25 September 1998.

the literature. Those that I suggest are most indicative of paradigmatic difference are highlighted.

**Table 6.1: Updated table of transformed and traditional court processes**

<b>Traditional Process</b>	<b>Transformed Process</b>
Dispute resolution	Problem-solving dispute avoidance
<b><i>Legal outcome</i></b>	<b><i>Therapeutic outcome</i></b>
Adversarial process	Collaborative process
Claim or case oriented	People, solutions oriented
<b><i>Rights based</i></b>	<b><i>Interest or needs based</i></b>
<b><i>Emphasis based on adjudication</i></b>	<b><i>Emphasis placed on non-adjudication and alternative dispute resolution</i></b>
Judge as arbiter	Judge as coach, mentor and mentor
Backward looking, retributive	Forward looking, rehabilitative
Precedent based	Planning based
Few participants and Stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical, evidence based
Formal	Informal
Removed from the community	Embedded in the community <sup>57</sup>
Efficient	Effective

Critics leave no doubt that, at least from their perspective, these differences are paradigmatic. Hoffman makes the following claims in relation to what Warren refers to as the ‘transformed’ processes applied by judges in the problem-solving courts, and of the drug courts in particular:

Suffice it to say that, if they are intended to free judges not only from the constraints of the separation-of-powers doctrine but even from the limits of our own expertise, they are dangerous ideas indeed. I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to ‘do good’ rather than to apply the law.

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<sup>57</sup> This means that members of the offender’s community may be involved in the court process—such as the participation of Indigenous community elders in the Indigenous sentencing tribunals and courts.

While some influential therapeutic jurisprudence advocates claim, for the movement, ownership of the ‘underlying philosophy’ that informs the problem-solving courts, they acknowledge that the degree to which a particular judge incorporates and applies therapeutic principles in their court depends largely on the ‘training, character and motivation’ of that individual judge.<sup>58</sup> This inevitability in the intensity of approach and application of therapeutic techniques and principles, however, is seen as a strength in that it is an indication that judges are thinking about the individual person appearing before them as an individual, and not as a member of a certain class. There is no significant reason, they add, why authoritative determinations of therapeutic jurisprudence best practice should not be developed to promote consistency where it is required.

To attempt to identify a complete, discrete set of therapeutic jurisprudence exemplars would be, to some extent, a speculative exercise. This is not to say that such exemplars do not exist. The argument here is that they certainly do exist, but they exist mostly as modifications of existing adversarial exemplars. Kuhn acknowledges that ‘although the world does not change with a change of paradigm, the scientist afterward works in a different world’.<sup>59</sup> What he means is that as a paradigm shifts, practitioners use different filters to sort and classify their observations and to test data.

Nevertheless, we can identify attempts to prescribe therapeutic exemplars across a range of law and justice fields. Birgden, for example, suggests a normative framework for offender rehabilitation that places an increased emphasis on individual autonomy in the process of balancing offender and community rights.<sup>60</sup> She concludes that we ought to balance justice and

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<sup>58</sup> King, Freiberg et al, above n 55, 168. King identifies a spectrum of judicial approaches to ‘problem solving’, from simply having the participants attend at court so that the judge can monitor compliance, to engaging with participants by taking ‘an active interest in them and applying strategies that support participants’ motivation to engage in positive behavioural change’.

<sup>59</sup> SSR 121.

<sup>60</sup> Birgden, above n 35, 57–8.



therapeutic principles such that community rights should not automatically trump offender rights. This is a position that, if adopted, would be a significant modification to the traditional approach to offender management. She argues, *inter alia*, that 'if offenders reject rehabilitation, based on an informed decision, then this decision should be respected'. She makes this suggestion based on a growing body of therapeutic jurisprudence work in this field.<sup>61</sup>

Other therapeutic jurisprudence practitioners advocate ethical exemplars that would change our idea of what it means to be an ethical lawyer. Evans and King offer advice 'for those practicing lawyers for whom therapeutic jurisprudence may become a central motivation to practice law ... reflecting on the moral advantages that virtue ethics can offer such practitioners in their daily decision making'. These authors suggest that a virtuous orientation would require that a therapeutic jurisprudence practitioner, supported by an ethic of care, is ethically obliged to first 'know themselves' before advising their client of not only the legal consequences of any particular course of action, but of 'all the possible effects for themselves and others' arising from the various legal options, and to suggest those options that best promotes the client's best interest while minimising the 'negative side effects on other people'.<sup>62</sup> This requirement of emotion intelligence and self-awareness is a strong enough thread in therapeutic jurisprudence scholarship and practice that it certainly approaches exemplar status.<sup>63</sup>

Daicoff also highlights the differing roles potentially played by personal values and personal morality in adversarial as opposed to non-adversarial practice. This inevitably arises in discussions about a less objective focus

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<sup>61</sup> She cites, in support of this view: Bill Glaser, 'Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs' (2003) 4(2) *Western Criminology Review* 143.

<sup>62</sup> Evans and King, above n 28, 746.

<sup>63</sup> See especially Susan Daicoff, *Lawyer Know Thyself A Psychological Analysis of Personality Strengths and Weaknesses* (2004).

in the role of the lawyer or judge. Daicoff uses the analogy of an auto mechanic who is paid by a client to fix their car. The mechanic does not bother to ask the owner about whether they intend to use the car for any immoral purposes. The mechanic will not ask, suggests Daicoff:

‘You mean you are going to take this car, as soon as I fix it, drive across the country and abandon your wife, taking the family car with you at a time when your wife is nine months pregnant and needs the car to get to the hospital?’

‘Well, in that case I refuse to fix your car’.

In an analogous position, she suggests, many or most lawyers would just fix the car without considering any moral dimension.<sup>64</sup> This valuing of objectivity has earned praise for the profession generally when it has led to important civil reform (such as was the case in the US in the 1960s) but condemnation when it requires them to defend unpopular clients or causes. Pursuant to an adversarial paradigm, this sort of objectivity may seem axiomatic.

Daicoff’s research strongly suggests that the personality types for lawyers who succeed in contemporary litigation weigh against any move for lawyers to infuse some of their personal values and beliefs into the way in which they interact with and represent clients. She makes a carefully constructed and evidence-based argument that this same mismatch of the personality types associated with a traditional adversarial legal education and ethos applies to those lawyers who propose to act within an ‘ethic of care’ and also to ‘collaborative problem-solving, empathetic listening, and a more holistic approach to client representation’.<sup>65</sup>

Boldt and Singer compare the court conduct and style of judging of problem-solving judges to more traditional (adversarial) models of judicial behaviour. They contend that the judges who serve in the problem-solving

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<sup>64</sup> Ibid 107. Daicoff cites some academic views that this is a manifestation of legal realism, in which “‘the law” is often vague and uncertain and dependent upon the client’s situation, goals and risk preferences’. The law, under this view, is a constraining force, or limiting dataset that needs to be factored into a client’s problems or goals.

<sup>65</sup> Ibid 109.

courts 'have largely repudiated the classical judicial virtues of restraint, disinterest and modesty in favour of a more activist and therapeutic stance'.<sup>66</sup> These authors note that the traditional adversarial rests on two central pillars (in criminal proceedings at least): namely, the use of neutral detached decision makers and formal (binding) rules of procedure. In that context, the interests of the accused are generally seen to be adverse to those of the state and vice versa—and so the tripartite structure comprised of an accused, a prosecution and a neutral decision maker creates an unstable frame in the sense that it collapses into a two-against-one model once a decision is made. To maintain an appearance of legitimacy once this collapse occurs, neutrality and formality are relied upon to prevent the appearance of some alliance between the judge and the winning party.

Boldt and Singer neatly articulate why these adversarial pillars of neutrality and formality must represent paradigmatically different exemplars to those that inform the operation of a drug court (for example). They observe that:

In drug treatment courts by contrast, the stabilizing influence of judicial neutrality and formal rules of procedure are diminished precisely because the interests of the defendant are now seen as consonant with those of the State. The notion that the judge is bound to adopt a neutral position in the resolution of a conflict, is replaced in these courts by a role conception in which the judge is a partisan aiming to cure the offender of his addiction ... the judge is the leader of the offender's treatment team ... performing a therapeutic function on his or her behalf.<sup>67</sup>

If we assume the legitimacy of a therapeutic court, then in assessing whether such a therapeutic function is successful, further paradigmatic differences are apparent. As previously discussed, the emphasis in a

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<sup>66</sup> Richard C Boldt and Jana B Singer, 'Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts' (2006) 65(1) *Maryland Law Review* 82–99; *University of Maryland Legal Studies*, Research Paper No 2006–21, 82.

<sup>67</sup> Boldt and Singer, above n 66, 86–7. The authors also make the observation that the drug courts did not evolve as a 'grass roots effort' but as the result of a 'few hard-working and charismatic judges'. This neatly reflects the Kuhnian conception of a paradigm evolving from the work of a limited number of practitioners seeking to solve problems, rather than to solve puzzles within their discipline.

problem-solving court is placed more on effectiveness than efficiency or due process. As Casey has pointed out,<sup>68</sup> treatment is not judged by whether it is fair, or deserved, or proportional. When a child is immunised, it makes no sense to ask whether the pain experienced as a result of the injection is somehow deserved. What we do expect is that the vaccine is effective in preventing the disease. 'Ideas of liability, fault, guilt and fairness', suggests Casey, 'are irrelevant in a treatment regime'.

Adversarial exemplars are not, of course, fully displaced or replaced as these therapeutic exemplars make their way into the core of the disciplinary matrix. If an offender in a drug court does not comply significantly with the treatment regime, a decision is likely to be made that they should be removed from the program, and this is largely an adversarial process given that the offender is likely to resist it (probably with some adversarial advocacy from their legal representatives).<sup>69</sup>

Many of the problem-solving courts, in the common law jurisdictions, derive their constitutional legitimacy from the enabling legislation that creates and regulates them. In the public mind, at least, this provides an aura of legitimacy at the popular level. These courts do not seem to attract significant levels of public criticism. Those who appear before them seem to submit to their jurisdiction. For this reason, claims Casey and others, popular and perhaps some professional allegiance is owed 'not to the problem-solving court per se, but to traditional respect for the institution of the judiciary'.<sup>70</sup>

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<sup>68</sup> Timothy Casey, 'When Good Intentions are not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy' (2004) 57(4) *Southern Methodist University Law Review* 1459.

<sup>69</sup> The *Drug Court Act 2000* (Qld) provides, for example, at s 36A(1)(h), that a drug court magistrate must consider the views of the whole drug court team when considering the termination of an offender's program, but that the authority to terminate the program is solely that of the magistrate (s 34) and that this can be exercised upon application by the prosecuting authority: s 35(1)(c).

<sup>70</sup> Casey, above n 68, 1491.

Perhaps the greatest indication of the potential paradigmatic tension between some adversarial and therapeutic exemplars is the level of fear, and sometimes of distrust, that seems to characterise the concern of the judicial critics of therapeutic jurisprudence in general, and of the problem-solving courts in particular. Casey acknowledges this context of fear when he notes that:

A state mandated treatment program has a tendency to yield disastrous results when mixed with a punishment theory. The problem-solving courts present an even more audacious experiment [than the juvenile courts]: a state sanctioned treatment model *within* a punitive model. Thus the objective potential for illegitimacy runs higher for the drug treatment courts than for the juvenile courts.

However, conceding the ‘political intractability of the types of social problems addressed by problem-solving courts’, Casey<sup>71</sup> and other commentators,<sup>72</sup> acknowledge that illegitimacy can lead to change. This morphing of illegitimacy to pragmatic acceptance over time is at the heart of Kuhnian paradigm shift.

Although I have identified paradigmatic differences between adversarialism and therapeutic jurisprudence in this section, that does not establish that there is a paradigm shift in progress. As discussed in Chapter 2, such a shift is unlikely to be definitively identified and assessed until well after it has occurred. The recasting of illegitimacy as pragmatic and necessary adaptation is not something that occurs quickly. This is a reality that we can intuit from Freiberg’s use of the phrase ‘pragmatic

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<sup>71</sup> Casey concludes, given the organic nature of the problem-solving jurisdictions and the therapeutic agenda in general, that the ‘experimentalist spirit should be embraced and congratulated, and if these courts are to succeed in the future, that very same experimentalism must be used to continuously adapt the court structure in ways that increase legitimacy’: *ibid* 1519.

<sup>72</sup> Such as Peggy Fulton-Hora, William G Schma and John TA Rosenthal, ‘Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America’ (1999) 74 *Notre Dame Law Review* 439, 475–6.

incrementalism', which generated the analysis in this thesis. Given that there is strong evidence of an ongoing recasting of what may once have been seen as illegitimate court practices as pragmatic increments towards the solving of seemingly intractable problems, we now go on to assess the effect of that recasting.

## **6.6 Is the Current Tension Between the Two Models Indicative of Paradigmatic Shift?**

Given that some of the key differences between adversarialism and therapeutic jurisprudence appear to be exemplary in the Kuhnian sense, and therefore, paradigmatic, the final question to consider in this chapter is whether those differences are manifesting themselves to such a degree, within the practice of law, that we can conclude that a paradigm shift is underway.

Hoffmann represents the most strident dissenting voice in the resistance to the problem-solving jurisdiction and to therapeutic jurisprudence in general.<sup>73</sup> On the one hand, the problems of over-incarceration, of the relationship between endemic social problems and of unassailed recidivism cannot be denied. They are the very sorts of issues that Kuhn would identify as intractable problems that indicate a discipline in crisis. They can only be evidence of a paradigm shift, however, if the methods used to solve them are considered to be legitimate. Hoffman, as discussed in Chapter 5, does not accept the legitimacy of these 'new' methods. He opines that there are very good reasons why we do not organise court lists so that we have specialist judges presiding over sex offences or burglary matters or homicides. To do so would act to concentrate the natural tendency of judges to vary in their perceptions of certain sorts of crime. We would not want, for example, a judge who is particularly punitive in his

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<sup>73</sup> Morris Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' (2002) 29 *Fordham Urban Law Journal* 2071.

personal attitudes to drug use to be solely tasked with the sentencing of drug offenders, according to Hoffman.

The nature and quality of such dissent and opposition to therapeutic jurisprudence is the best evidence that it is viewed as, or at least as part of, a shift in paradigm and not just some tinkering with the parameters of adversarial process. Importantly, the advocates and practitioners of therapeutic jurisprudence provide the best evidence of the existence of therapeutic exemplars, but the perception that these exemplars stand in opposition to some current adversarial exemplars is almost entirely that of the critics. As discussed above, the strongest critics of therapeutic jurisprudence see it as a threat, not as a viable alternative or as the complementary addition to the judicial repertoire in the way that advocates such as Wexler, King, Hora and many others envision.

One of the clearest indications of a Kuhnian paradigm shift (as discussed in Chapter 2) is a movement in the weight of scholarship from one paradigm to another. As a new paradigm gains momentum, more practitioners begin to work with it and to advocate for it. More younger practitioners, especially, commence their careers accepting the exemplars of the new paradigm as a given. More university courses devote space in the syllabus and curriculum for it, and the scholarly journals devote more publishing and editorial emphasis to it. The critical mass of therapeutic jurisprudence scholarship, research, practice, publications and collaborative dissemination is, as highlighted in Chapter 5, considerable.<sup>74</sup>

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<sup>74</sup> The International Network on therapeutic Jurisprudence asserts that ‘the law’s role as a potential therapeutic agent should be recognized and systematically studied’. To that end, the network’s website collates 1905 peer reviewed journal articles dealing with therapeutic jurisprudence (see Appendix 1). It also stores refereed papers presented at four regular international conferences dedicated to the movement. There are also links to law and mental health journal special issues devoted to therapeutic jurisprudence. There is a listserve email discussion group that has been active for 10 years, an active blog and Facebook site. The network website also states that ‘the University of Miami School of Law has recently established a Therapeutic Jurisprudence Center, which will be directed

In the alternative (non-Kuhnian) rule- and evidence-based approach to disciplinary change, consensus persists to the extent that practitioners remain rational. To decide between two differing approaches or explanations, one simply examines the available evidence. The evidence may not be conclusive, but so long as the practitioners remain rational, they can debate among themselves the extent of the gaps in evidence according to the same criteria. Knowledge, under the latter regime, is cumulative. There is a dearth of this sort of analysis of the relationship between adversarialism and therapeutic jurisprudence in the literature.

A recurring theme in the post-/non-adversarial literature relates to the effectiveness of the justice system and, in particular, the effectiveness of the courts. Communities have a right and an expectation, so the argument goes, that courts will be fair and impartial, independent and efficient. However, they also need to be effective; effective in the sense that they are not just an end in themselves but also a means to an end. This theme questions whether the calling to account of criminal offenders ought to have a measurable effect on crime rates and recidivism. If they do not, then criminal courts can be seen as little more than a revolving gateway to incarceration.<sup>75</sup>

Within the rubric of an adversarial court system, conversely, courts are almost exclusively evaluated and assessed in terms of their efficiency. This is a clear reflection, as suggested in Chapter 3, of the close links between the liberal economic and political worldview and adversarial legal processes. Clearance rates are the gold standard for benchmarking courts within the annual reports for the various court jurisdictions in Australia. The

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by Professor Bruce J Winick, Laurie Silvers and Mitchell Rubenstein Distinguished Professor of Law. The Center is interdisciplinary in nature, and has ties to other departments and professors within the university': <<http://www.law.arizona.edu/depts/uprintj/>>

<sup>75</sup> Kevin Burke, 'The Tyranny of the "Or" is the Threat to Judicial Independence, not Problem-Solving Courts' (2004) Summer Edition *Court Review* 32.



Supreme Court of Queensland, for example, contains data related to ‘the court’s performance over the last year’, which the Chief Justice reminds us was ‘developed on the basis of the requirements of the Commonwealth Productivity Commission<sup>76</sup> in relation to its annual “Report on Government Services”’. <sup>77</sup> The report then observes that according to these requirements and benchmarks both divisions of the court (being the trial and appeal divisions) performed satisfactorily. This conclusion is based solely upon statistics detailing the caseload, clearance rates and disposable times of matters coming before the courts. There is also a collection of data in relation to budgetary details, the up-take of technology, judicial professional development activities and the work of the Supreme Court library.

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<sup>76</sup> Chapter 7 of the 2011 report from this body, entitled ‘Court Administration’ asserts that ‘[c]ommon objectives for court administration services across Australia are: to be open and accessible; to process matters in an expeditious and timely manner; to provide due process and equal protection before the law; and to be independent yet publicly accountable for performance’. Although there is acknowledgement that courts ought to be seen as effective in terms of how accessible their services are to a range of demographics, there is little or no focus on the results of such access in terms of therapeutic outcomes. The ethos and methodology of these reports are overwhelmingly economic. Outputs are the services delivered, while outcomes are the effect of these services on the status of an individual or group. The report acknowledges (at 7.22) that ‘[e]quity is currently represented through one output indicator (“fees paid by applicants”). Effectiveness is represented through two output indicators (“backlog” and “judicial officers”)’. Efficiency, according to this same section, is ‘currently represented through three output indicators (“attendance”, “clearance” and “cost per finalisation”)’. The report does concede that the activities of court administrators lead to broad outcomes within the overall justice system, but observes that these are not ‘readily addressed by this service specific chapter’. Instead, the claim is that the report’s statistical appendix contains data that may assist in interpreting these performance indicators. These appendicised data refer to access and clearance rates for demographic and geographic characteristics, including age profile, geographic distribution of the population, income levels, education levels, tenure of dwellings and cultural heritage. Report available online at

<[http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0010/105310/028-chapter7.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0010/105310/028-chapter7.pdf)>.

<sup>77</sup> Supreme Court of Queensland, *Annual Report 2011–2012*

<[http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0006/167928/sc-ar-2011–2012.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0006/167928/sc-ar-2011–2012.pdf)>.

I have argued elsewhere<sup>78</sup> that we can identify the following formal criteria by which courts are evaluated across Australian jurisdictions:

- disposition of caseload
- workload (usually tabulated as civil and criminal matters heard by the court)
- length of time matters take to reach judgment; number of judgments delivered
- timing between hearing and delivery of reserved judgments
- sitting times of individual judges
- issuing of practice directions
- numbers of case appraisals, mediations, case supervisions, judicial reviews and applications heard
- developments in court and registry processes and administrative procedures
- training undertaken by judges and court staff
- information technology, equipment and facility improvements and expenditure.

These authors identify some initiatives designed to take a more qualitative snapshot of mainstream court functioning, including the *International Framework for Court Excellence*, which claims to represent a ‘framework of values, concepts, and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver’.<sup>79</sup> However, an examination of the evaluative criteria in this document (and similar publications) are still primarily concerned with principles of administrative and economic efficiency, procedural fairness and due process as reported by users of the courts. They do not attempt to assess whether the court is achieving any broader social, political or

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<sup>78</sup> N Stobbs and G Mackenzie, ‘An Analysis and Evaluation of Australian Indigenous Sentencing Courts’ (2009) 13(2) *Australian Indigenous Law Review* 90–3.

<sup>79</sup> National Centre for State Courts, *International Framework for Court Excellence* (2008) 3 <<http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf>>.

cultural outcomes. My fellow researcher and I found this to be unsurprising given that these broader outcomes are the *raison d'être* of the Indigenous courts and indeed of the problem-solving and specialist courts in general:

If we conceive of the specialist courts as a subset of the overall jurisdiction of the mainstream courts, which are specifically tasked with addressing issues such as recidivism, attendance rates, rehabilitation and lifestyle problem-solving, then we might expect these courts to have more specialised and carefully delineated outcomes-based objectives.<sup>80</sup>

Efficiency and effectiveness are often conflated, by virtue of emphasising clearance rate efficiency to the extent of ignoring effectiveness. For example, barrister Peter Faris QC, in an article commenting upon the expansion in jurisdiction of the Koori Court system from the Magistrates' Courts into the County Court, asserts that:

Victoria has opted to spend money on a touchy, feely criminal court designed to give soft justice to Aboriginal ... offenders. This is a stupid waste of money. ... The new court is supposed to be based upon the success of the Koori Magistrates Court, which disposes of 150 Aborigines a year in six courts—an average of one a fortnight ... We now have a form of reverse discrimination, defined by racial characteristics and to be applied by the justice system.<sup>81</sup>

Faris argues that the existence of Indigenous courts constitutes an unacceptable legal dualism and a breach of the Rule of Law, which is reminiscent of the objections of some of the judicial critics of therapeutic

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<sup>80</sup> Stobbs and Mackenzie, above n 78, 95. Marchetti and Daly identify further aims for the Koori Court, in terms of both operational and community-building roles, from the Attorney-General's second-reading speech of the legislation. The operational aims are to further the ethos of reconciliation by incorporating Aboriginal people in the process and by advancing partnerships developed in the broad consultation process that led to the Koori Court's adoption; divert Koori offenders away from imprisonment to reduce their overrepresentation in the prison system; reduce the failure-to-appear rate at court; decrease the rates at which court orders are breached and deter crime in the community generally: Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 434.

<sup>81</sup> Peter Faris, "'Kooris' Court a Waste of Money', *The Australian* (online), 9 May 2008 <<http://www.theaustralian.com.au/business/legal-affairs/kooris-court-a-waste-of-money/storye6frg986-1111116285918>>.

jurisprudence cited above. This dualism is invalid, he claims, because the clear implication of the specialised courts is that Indigenous offenders will receive sentences that are more lenient in comparison to non-Indigenous offenders in similar cases.<sup>82</sup> We ought not to conflate issues of jurisprudence with more pragmatic issues of economics and efficiency. Arguments about efficiency and effectiveness need to be distinct from arguments about jurisprudence and political ideology.<sup>83</sup>

In a response to the Faris criticism, then Victorian Attorney-General Rob Hulls adopted a different evaluative perspective, asserting first that the Koori Court has in fact been very successful in reducing recidivism rates among Aboriginal offenders in Victoria.<sup>84</sup> Hulls suggests that this is mainly due to the presence of elders and respected persons in the Court. Hulls

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<sup>82</sup> The assertion made repeatedly in the Faris article that the principle of equality before the law somehow implies that all offenders, regardless of their circumstances or context, ought to be dealt with in the same court, seems odd at a time when the range and number of specialist courts convened for the express purpose of dealing with specific classes of offender (such as the highly successful drug courts) are rapidly expanding. Further, there is ample and longstanding research to suggest that cultural, social and linguistic factors significantly affect the experience of Indigenous Australians in the court system—see, eg, Nigel Stobbs, ‘An Adversarial Quagmire: The Continued Inability of the Queensland Criminal Justice System to Cater for Indigenous Witnesses and Complainants’ (2007) 6(30) *Indigenous Law Bulletin* 15. We ought not to adopt an overly simplistic notion of ‘equality’ when we are dealing with something as complex and layered as the criminal justice system.

<sup>83</sup> Marchetti and Daly point out that the differences in policy approaches to the role of the Indigenous courts between jurisdictions can have a significant effect on the volume of matters dealt with. Their study observed, for instance, that the Port Adelaide Nunga Court in South Australia dealt with 134 Indigenous offenders in the 2005–6 year, while the Nowra Circle Court in New South Wales appeared to sentence 13 or fewer offenders per year. They attribute these differences to the policy of the former court to accept for sentencing any eligible Indigenous offender, while the latter court will deal only with matters where there is likely to be a custodial sentence and the offender is assessed as being receptive to change: Marchetti and Daly, above n 80, 414, 429–30.

<sup>84</sup> Rob Hulls, ‘Koori Courts Help Cut Repeat Offences’, *The Australian* (online), 16 May 2009 <<http://www.theaustralian.com.au/business/legal-affairs/koori-courts-help-cut-repeat-offences/story-e6frg986-111116350347>>.

further asserts that sentences handed down by the Koori Court are not more lenient, and that a cost-benefit analysis of the courts must take into account any reduction in costs due to lower recidivism rates (such as the need for fewer prison beds).

Thus, we must conceive of the value of the Koori Court, Hulls argues, in terms of its role in combating the over-representation of Aboriginal people within the criminal justice system, separately to the question of costs and judicial workloads.<sup>85</sup> This is the context in which a shift in exemplars, and hence in a juristic paradigm, is most likely to be detected. We are not likely to find an adversarial exemplar that requires an assessment of the comparative representation of particular demographics or racial groups within the justice system. That is not to say that a justice system acting according to an adversarial paradigm must ignore such considerations, but they are never a measure of validity.

Marchetti and Daley also emphasise the different exemplars that are at play at the heart of problem-solving and other specialist courts in their study of these courts across Australian jurisdictions. They make reference to the extent to which a court can empower communities (in this case Indigenous communities) to 'bend and change' mainstream law by acknowledging and allowing the expression of Indigenous methods of social control. They say:

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<sup>85</sup> Hulls asserts that Koori people, for example, are 12 times more likely than non-Indigenous people to be incarcerated and that Koori contact with police had risen by over 30 per cent in the previous five years. Over-representation is clearly still both a chronic and acute problem. According to the Australian Bureau of Statistics, Indigenous people comprised 25 per cent of the total Australian prison population as at 30 June 2009: Australian Bureau of Statistics, *4517.0—Prisoners in Australia* (2009) 8 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12009?OpenDocument>>. This is despite Indigenous people comprising only 2.5 per cent of the Australian population: Australian Bureau of Statistics, *4714.0—National Aboriginal and Torres Strait Islander Social Survey* (2008) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4714.0Main+Features12008?OpenDocument>>.

With the political aspiration to change Indigenous-white justice relations, Indigenous sentencing courts, and Indigenous justice practices generally, are concerned with group based change in social relations (a form of political transformation), not merely change in an individual.<sup>86</sup>

In the mainstream court system, claims Hulls, offenders 'can hide behind their lawyers', whereas, in the Koori Court, as in most Indigenous sentencing tribunals, offenders must speak for themselves and answer questions on why they committed an offence. They are forced to take full accountability for their actions in a way that is far more confronting than the mainstream court process. This is, in large part, a function of the interventionist role and style of the judge in these specialist jurisdictions.

Within the criminal justice system there are obvious elephants in the room that point to a crisis in public policy, which in turn point to a disciplinary crisis. The results of a failure to recognise paradigmatic alternatives, as such, are stark. For example, incarceration levels have clearly reached crisis levels in some major jurisdictions. Adversarial sentencing, reduced to the application of grids, is simply formulaic and incommensurable with a therapeutic approach. Judge Merrit, in dissenting in the US Court of Appeals, Sixth Circuit matter of *US v Jeross*, observes that:

This is another drug case in which our system of criminal law has imprisoned for many years two more lives and torn up two more families by grossly excessive sentences imposed in the 'War on Drugs' ... which is the advent of our irrational set of sentencing guidelines that judges apply by rote on a daily basis ... These sentencing guidelines hold that mitigating factors like family ties, mental illness, education, and the likelihood of rehabilitation are simply 'not relevant' in the sentencing process. Judges' minds are closed down and sentences ratcheted up by applying convoluted conversion formulas like the one just recited in the majority opinion.<sup>87</sup>

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<sup>86</sup> Marchetti and Daly, above n 80, 429–30.

<sup>87</sup> *United States of America v Joseph Jeross and Kathleen Docherty* 06–2257, 06–2502 (2008).

In the criminal jurisdiction, therapeutic jurisprudence advocates certainly see therapeutic principles as belonging within the legal disciplinary core. Wexler asserts that factors of procedural fairness and due process must always be tempered by an understanding and application of psychological data in relation to an offender's readiness for rehabilitation and that a failure to do so often leads to a 'defiance effect' and consequently increased levels of offending and recidivism.<sup>88</sup> Wexler goes on to conclude that:

there comes a time—and we now seem to be well past it—where outcome is as important as process. The public will not and should not regard the court system with satisfaction and perceived fairness unless the incarcerative crisis is tackled and the rehabilitative challenge is met.<sup>89</sup>

Not everyone agrees that a problem-solving ethos is a valid way of reducing incarceration rates, however. In responding to claims that problem-solving courts are a threat to judicial independence in that they require such judges to stray from the role of the neutral arbiter, Burke makes the point that it is possible for judges to be both practitioners of due process and problem solvers.<sup>90</sup> He says, in response to the suggestion that a judge must be either one or the other:

False choices like this represent a tyranny of limited thought and an unnecessary limit on the ability of judges to perform the work today's society and its problems require.<sup>91</sup>

Regardless of whether we agree with the divergent opinions of critics such as Hoffman or the reconciliatory assertions of Burke (and others), this

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<sup>88</sup> David Wexler, 'Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence' (2008) 44(3) *Court Review* 78.

<sup>89</sup> *Ibid* 80.

<sup>90</sup> The strongest therapeutic jurisprudence advocates continually emphasise their belief that these approaches should not, and do not, trump existing legal rights and obligations, either substantive or procedural.

<sup>91</sup> Kevin Burke, 'The Tyranny of the "Or" is the Threat to Judicial Independence, not Problem-Solving Courts' (2004) Summer Edition *Court Review*.

jurisprudential analysis and debate about the validity of the judicial role in jurisdictions that have already experienced evolution beyond a simple application of adversarial norms and procedures is strong evidence of a shifting paradigm.<sup>92</sup>

Given that, arguably, the most obvious implication of Kuhn's proposed structure of scientific revolutions is that they take place over a relatively long period, during which the exemplars of the new paradigm become entrenched in the discourse and language of the discipline,<sup>93</sup> we ought to be able to identify longitudinal trends towards a non-adversarial paradigm if a shift is underway. Those trends need not necessarily consist of body of successfully completed experiments or trials according to Kuhn, who says that '[t]he success of a paradigm is ... largely a promise of success discoverable in selected and still incomplete examples'.<sup>94</sup>

Burke traces the evolution of the modern problem-solving court from the convening of the first juvenile court in Chicago in the early 1900s. In this court, the judicial role and some rules of evidence and due process were displaced on the grounds that they were thought to hinder an approach that was in the best interests of the child. Different terminology was used to encourage a divergent approach to that used with adult offenders. A juvenile was a delinquent rather than a criminal. The delinquent was adjudicated rather than judged. The delinquent was held in detention rather than imprisoned and if the detention was to be of a significant duration, then it was referred to as a school, camp or program. The juvenile was said to be committed to these programs rather than being sentenced to a punishment.<sup>95</sup>

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<sup>92</sup> Burke hints at the increasing emphasis on non-adversarial factors in determining an effective judiciary by observing that '[e]very judge, regardless of assignment, struggles to find the balance between neutrality and caring, but this is especially important in problem-solving courts': *ibid* 34.

<sup>93</sup> SSR 24.

<sup>94</sup> *Ibid*.

<sup>95</sup> Burke, above n 91, 33.



Describing the qualities needed in a judge of the Juvenile Court in those times, Judge Julian Mack wrote in 1909:

He [sic] must be able to understand the boys' point of view and ideas of justice; he must be willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the cooperation, oftentimes, of many agencies, the cure may be effected.<sup>96</sup>

Mack's discussion, penned over a century ago, is not dissimilar to common sentiments and beliefs about the nature of problem-solving courts today and expressly reflects some of the transformed processes set out in Table 6.1. He asserts that the role of the juvenile court judge is not to determine whether the young boy or girl has committed a 'specific wrong', but to determine 'what is he [sic]' and how he has become what he is, and what can best be done, in both the interests of the child and of the state, to save him 'from a downward career'.<sup>97</sup>

The paternalistic nature of these early juvenile courts led to an unacceptable amount of arbitrariness, in that the sorts of orders and programs dished out by individual judges depended largely on their individual sense of what their role ought to be (in many cases, as de facto parents). In the latter half of the 20<sup>th</sup> century (post the decision of the US Supreme Court in *In re Gault*),<sup>98</sup> many of the due process rights that had been removed for the purposes of juvenile proceedings were restored.<sup>99</sup> Juvenile court judges were then required to, and to a large extent did, reconcile the divergent requirements of due process and problem solving. Burke concludes that the role of the judge is changing and that the line of demarcation between adjudication and problem solving remains blurred.

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<sup>96</sup> Julian W Mack, 'The Juvenile Court' (1909) 23 *Harvard Law Review* 104–19.

<sup>97</sup> Ibid 120.

<sup>98</sup> *In re Gault* 387 US 1 (1967). See also *Kent v US* 383 US 541 (1966).

<sup>99</sup> Such as the right to be legally represented, to cross-examine prosecution witnesses and to be notified of charges, otherwise guaranteed in the 14th amendment to the US Constitution: <<http://www.law.cornell.edu/constitution/amendmentxiv>>.

However, he insists that if courts are tasked with fostering closer relationships with communities and with addressing previously intractable problems, that articulating the different requirements of due process and problem solving is a variation on the ‘tyranny of “or” ... [which is] viral and destructive’.<sup>100</sup>

If we accept the evidence of problem-solving judges and practitioners such as Burke that due process and problem solving are reconcilable, then the question remains as to which context dominates the disciplinary core in terms of providing exemplars. Burke cites a letter from a drug court judge in upstate New York to Chief Justice Kaye in which she notes:

I for one ... attest to the revolution in the criminal justice system with the advent of the drug treatment court and domestic violence court. Today we do it a lot better than it was done yesterday ... I am a local judge positively affecting the lives of many people in my community. A great blessing I cherish.<sup>101</sup>

We can, then, identify some examples of significant longitudinal trends in relation to the tension between adversarial and therapeutic forces in both jurisprudence and in legal practice. In the case of the American juvenile courts, it seems as though there was a period of about 50 years in which the operating philosophy of the courts (and of the judges who comprised them) accorded to something very much akin to a therapeutic paradigm (even to the exclusion of some core due process exemplars). The Supreme Court in *In re Gault* paired back the displacement of the constitutional requirements for due process and the usual laws of evidence, but did not in any way invalidate those therapeutic principles and practices that were consistent with these requirements.

There is ample evidence that therapeutic exemplars are becoming more formalised and evidence-based, and that they are having a significant effect on how entities such as the problem-solving courts are evaluated.

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<sup>100</sup> Ibid 35.

<sup>101</sup> Judith Kaye, *The State of the Judiciary: 2004*, 9 February 2004, <<http://www.courts.state.ny.us/ctapps/soj.htm>>.

The Centre for Court Innovation, for example, has published a detailed set of what it calls ‘universal performance indicators for problem solving courts’.<sup>102</sup> The Centre intends these performance indicators as potentially useable by all problem-solving courts, albeit in ways that are suited to their particular methods. However, it is of interest that these performance indicators are also meant for ‘conventional courts that wish to document their problem-solving activity’.

In terms of demonstrating incommensurability with adversarial exemplars, and of some evidence of a possible shift in paradigm, the Centre acknowledges that although problem-solving courts will work to address the problems of individuals, they should also seek a broader effect ‘both within the justice system and in the broader community’.<sup>103</sup> Courts are expected, according to these indicators, to educate key players about the nature of relevant health and behavioural problems (including drug abuse, mental illness and domestic violence). Pursuant to an adversarial paradigm, this could well be seen as an attempt by courts to exceed their adjudicative mandate. If we consider this expanded role in the light of the further expectation that problem-solving courts should seek to be more than mere boutiques that do not affect significant numbers of cases within a jurisdiction,<sup>104</sup> the expansion of influence as a formal expression of intent is obvious.

Worldviews change slowly and incrementally. Consequently, paradigms generally change very slowly. Whether paradigms change incrementally is a question of perspective. To practitioners working during a period of crisis and revolution, it probably appears that the way they work is changing incrementally. What they see appears to be the promise of doing things in a better way. Advocates of the existing paradigm will usually see no need for such a promise, believing that the current paradigm is optimal and that

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<sup>102</sup> Rachel Porter, Michael Rempel and Adam Mansky, ‘What Makes A Court Problem-Solving?’ (2010) *Best Practices Series*.

<sup>103</sup> Ibid 32.

<sup>104</sup> Ibid 33.

any change is incremental fine-tuning. When aligned with a powerful and pervasive worldview, it may appear, to these conservative advocates that a shifting paradigm is just pragmatic incrementalism, the end result of which will be ideological stasis based on practical perfection. The neo-liberal worldview<sup>105</sup> is so pervasive in our political, economic and intellectual life that some social scientists claim that we have reached the end of history. Political economist Francis Fukuyama notoriously claims that:

[w]hat we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.<sup>106</sup>

This sort of fundamentalist hubris, which makes explicit claims about the linking of a neo-liberal political paradigm with the natural order, is of obvious appeal to the conservative thread in law and jurisprudence. In fact, the very nature of a written constitution guarantees that the relationship is reciprocal; that is, that law is linked to the liberal worldview in the very coercive fabric of the Rule of Law.

Kagan has examined this link in some analytical depth by studying the extent to which an adversarial culture is ingrained in American social and political history, claiming that:

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<sup>105</sup> This can generally be categorised as the idea that material prosperity, economic growth and social well-being are best achieved through the actions of individuals pursuing their self-interest within freely functioning markets. Interestingly, there would seem to be some evidence that this neo-liberal paradigm is currently in a state of crisis as a result of the Global Financial Crisis of 2009. Governments in liberal democracies appear much more willing to intervene in the market and to regulate them, in order to both attempt to prevent dysfunction and to repair fundamental problems rather than to punish individual transgressions by corporations. This might, to some extent, be related to the phenomenon of the problem-solving courts, where judges are far more interventionist and managerial than would be the case in a mainstream court (informed by traditional liberal principles), in an attempt to resolve the causes of offending and to identify and repair dysfunction.

<sup>106</sup> F Fukuyama, 'The End of History?' (1989) 16(1) *The National Interest* 3, 18.

[t]he rhetoric of law is deeply rooted in American consciousness, and has been so embedded since the founding of the country, as captured by John Adam's oft quoted description of the American polity as a government of law, not of men.<sup>107</sup>

Kagan identifies the roots of adversarial legalism as the:

political traditions and legal arrangements that provide incentives to resort to adversarial legal weapons ... [and] from the relative absence of institutions that effectively channel contending parties and groups into less expensive and more efficient ways of resolving disputes.

He claims, not that the prevailing political culture explicitly focuses citizens toward adversarial legalism, but that it denies citizens other remedies or mechanisms for influence or policy implementation. He asserts that the current political culture;

demands comprehensive government protections ... [while at the same time] mistrust[ing] government power [resulting in] fragment[ed] political authority [that must be held] accountable through lawsuits and judicial review.<sup>108</sup>

This does sound significantly comparable to the style of administrative law and of government regulation, accountability and oversight in the liberal democracies, including Australia. The exponential growth of the tribunal system as a means of obtaining redress against public authorities is some evidence of this as in an increasing reliance on sanctions among regulatory bodies.<sup>109</sup>

Granted, the overall role of the adversarial trial is not exclusively about picking a winner or giving legal resolution to a dispute—other elements/purposes are part of the paradigm. It serves, for example, some symbolic and cathartic functions (as Duff has recently

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<sup>107</sup> R Kagan, *American Legalism: The American Way of Law* (2002) 18. Kagan uses this term (legalism) to refer to the particular style of 'policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation' that is prevalent in the US.

<sup>108</sup> Ibid 34–5.

<sup>109</sup> There is quite a bit of empirical support for this in Kagan's research. He finds that regulatory authorities and public interest matters are much more likely to be collaborative in the civil law jurisdictions than in those with an adversarial system of law evolving from the Westminster system.

explained),<sup>110</sup> reducing stresses and tensions in a community or group through demonstrations and communications of justice being done. The important ritual nature of the adversarial trial, based on the relevant cultural norms of the particular jurisdiction, is perhaps best reflected in the use of juries in Western liberal democracies and common law countries.<sup>111</sup>

Despite the express reservations of some of therapeutic jurisprudence's strongest advocates about the dangers of appearing to threaten the primacy of existing adversarial principles and rules, it could well be that in order for therapeutic jurisprudence to prosper and to influence the wider juristic model to the extent that these same advocates hope for, rather than to be limited to what Freiberg earlier referred to as 'pragmatic instrumentalism', it needs to be perceived as being integrated with an alternative and coherent paradigm. The major theoretical risk of denying it paradigm status is that its core messages will be lost by being marginalised and located in the conceptual fringe, rather than in the jurisprudential core of exemplar-producing principles and values.<sup>112</sup> Legal theory and jurisprudential principle that arise within the adversarial paradigm tend to take some key concepts and procedures as so much connected to the core skeleton of principle that they are unassailable, and therefore, assumed. This accords with Kuhn's conception of the paradigm.

However, if the paradigm itself is left unchallenged, and is valued for its very stasis and conservatism as is arguably the case with the law, then the focus of legal scholars, theorists and reformers will be predominantly on

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<sup>110</sup> Anthony Duff, Lindsay Farmer et al, *The Trial on Trial Volume 1: Truth and Due Process* (2004) 85.

<sup>111</sup> Coke suggested that the legitimacy conferred on a trial by the use of a jury was that '[t]he law delighteth herself in the number twelve ... that number twelve is much respected in Holy Writ, as in twelve apostles, twelve stones, twelve tribes': cited in P Haldar, 'On the Sacrifice in Criminal Evidence, in P Rush, S McVeigh and A Yound (eds) *Criminal Legal Doctrine* (1997).

<sup>112</sup> As was discussed in Chapter 5, there is evidence that some therapeutic jurisprudence advocates seem to be insufficiently aware of this risk.

further defining and refining those concepts that are taken for granted (such as rights, property, due process, ownership and criminal responsibility). Historically, the most influential writings of jurists (meaning that which is most likely to be cited in courts) is doctrinal analysis (really a subset of the first principles analysis that characterises work within the humanities) or what is sometimes referred to as ‘analytical jurisprudence’. The emergence of a greater citation of therapeutic jurisprudence-related research and writing, discussed earlier in this chapter, is evidence of an emerging shift.

## 6.7 Conclusion

A period of crisis, indicative of a paradigm shift, is not necessarily characterised by chaos, in-fighting and hand-wringing about the inability of a discipline to do its job. Although a few of the chronic, intractable problems of communal human living that we expect the law to provide us with tools for addressing remain sources of fierce academic and public debate, our legal system seems to be functioning. The most obvious and important indication of a paradigm in shift, according to Kuhn, is evidence of a socio-cultural discontinuity within the discipline itself, largely represented by a divergent language.

The development of an alternative paradigm is fundamentally a heuristic process in that it involves experience-based change. Heuristic methods are useful for accelerating the search for solutions to paradigm problems. They do this by avoiding the sort of exhaustive hypothesis-testing method of evaluating all possible alternative approaches, by using less formal methods such as informed or ‘educated’ guesses, intuitive judgments or common-sense best estimates. Although a changing disciplinary language based on a developing set of changed heuristics, which reflects a changing worldview, are necessary *indicia* of a shifting paradigm, they are not sufficient. Advocacy and promotion of the new paradigm are required.

Mathematician George Pólya wrote of the necessity of coupling rhetorical persuasion based on a passionate commitment to a particular worldview with a set of practical heuristics for solving persistent problems within a discipline as the only way to truly resolve the 'logical gaps' between competing fundamental directions within that discipline.<sup>113</sup>

Proponents of a new system can convince their audience only by first winning their intellectual sympathy for a doctrine they have not yet grasped. Those who listen sympathetically will discover for themselves what they would otherwise never have understood. Such an acceptance is a heuristic process, a self-modifying act, and to this extent a conversion. It produces disciples forming a school, the members of which are separated for the time being by a logical gap from those outside it. They think differently, speak a different language, live in a different world, and at least one of the two schools is excluded to this extent for the time being (whether rightly or wrongly) from the community of science ... Demonstration must be supplemented, therefore, by forms of persuasion which can induce a conversion. The refusal to enter on the opponent's way of arguing must be justified by making it appear altogether unreasonable.<sup>114</sup>

Innovative processes and practices associated (to varying degrees) with the therapeutic jurisprudence movement that have been discussed in this chapter do seem to delineate a body of scholars and practitioners who, in Pólya's words, 'think differently', 'speak a different language' and to some extent 'live in a different world' to the legal mainstream. There is also no doubt that some strong critics of therapeutic jurisprudence seek to have it excluded from the community of jurists on the basis of these differences.

However, the lines of conceptual demarcation are blurred thanks to a spectrum of modified language. How are we to assess, for example, innovations with somewhat conceptually ambiguous descriptions, such as the proceedings within the Family Court of Australia, referred to as 'less adversarial proceedings'<sup>115</sup> or 'a significantly less adversarial approach',<sup>116</sup>

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<sup>113</sup> George Pólya, *How to Solve It* (1945).

<sup>114</sup> Struan Jacobs and RT Allen (eds), *Emotion, Reason And Tradition: Essays On The Social, Political And Economic Thought Of Michael Polanyi* (2005) 11.

<sup>115</sup> Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93.



as compared to innovations that are expressly labelled as ‘non-adversarial justice’? The answer could be that we do not need to comprehensively assess this spectrum in contemporary academic discourse. Kuhn acknowledges that the history of a discipline will always seem more revolutionary to the historian, who can often have the benefit of centuries to look back on, than to the everyday practitioner working in smaller pragmatic increments to solve the puzzles of the day.<sup>117</sup>

If adversarialism is too vague in meaning, future historians of law would not be able to identify a time at which it had been replaced.<sup>118</sup> Any moment in time that we point to and say, ‘This is where the adversarial paradigm was replaced with the therapeutic paradigm (or with a non-adversarial paradigm)’, would be a purely arbitrary exercise and would at best be a matter of convention or of pragmatic consensus. It could be that this is the way that a juristic paradigm must change: that one fades out as another ascends by reference to both the weight of practitioner consensus and what is happening in practice.<sup>119</sup> The universal performance indicators for

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<sup>116</sup> Stephen O’Ryan, ‘A Significantly Less Adversarial Approach: The Family Court Of Australia’s Children’s Cases Program’ (Paper presented to the annual conference of the Australian Institute of Judicial Administration, 2004).

<sup>117</sup> Thomas Kuhn, ‘Commensurability, Comparability, Communicability’ in PD Asquith and T Nickles (eds), *PSA 1982, Vol 2: East Lansing: Philosophy of Science Association* (1983).

<sup>118</sup> Although according to Kuhn and others, there may not be any discrete point of divergence between paradigms, the change is more likely to be organic.

<sup>119</sup> This is a version of the sorites paradox. The sorites paradox is the name given to a class of paradoxical arguments, also known as little-by-little arguments, which arise as a result of the indeterminacy surrounding limits of application of the predicates involved. Example: we can uncontroversially claim that a person who is five years old is a biological child. They remain a child one second later, and one second after that and one second after that, and so on. What distinguishes the quality of being a ‘child’ from not being a ‘child’ cannot be just a single second. Therefore, after 20 years has passed for this hypothetical person (20 years being a collection of many seconds), they must still be a child. Once identified, vagueness can be seen to be a feature of syntactic categories other than predicates, nonetheless one speaks primarily of the vagueness of predicates.

problem-solving courts devised by the Centre for Court Innovation is evidence of more formalised changes to practice.

Kuhn claimed that paradigm debates are not really concerned with the current relative problem-solving strengths of each paradigm (although in the literature that is what is focused on) but more about which paradigm is more likely to resolve *future* problems, and in that sense they have an element of faith to it. Pythagorean mathematicians were unable to explain irrational numbers in the language of existing mathematics, but by assuming that irrational numbers existed (an act of faith), they were able to use them to solve practical problems. Kuhn further claimed that for a paradigm to succeed, there must be some advocates and practitioners who have both faith and the ability to apply it, and also take the risk of it being wrong. Many initial supporters of the paradigm may be attracted to it for the wrong reasons.<sup>120</sup> However, the longer it refuses to go away and the more critical mass it accumulates, the more likely it is to prevail.

A practitioner who resists the new paradigm once it has been accepted is not necessarily unreasonable or illogical, he simply is not a practitioner of that profession anymore (not a scientist, as Kuhn puts it). We are a long way from that level of incommensurability yet, but certainly we can say that the typical problem-solving court lawyer and judge would appear to an outside observer as very different sorts of practitioners to the lawyer and judge in an adversarial court.

The tipping point for a paradigm shift does not necessarily occur when a particular amount of evidence of proof has been generated. Acceptance and application by a body of stakeholders who are schooled in the new

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Names, adjectives, adverbs and so on are only susceptible to paradoxical sorites reasoning in a derivative sense.

<sup>120</sup> For a list of some of those potential wrong reasons in relation to therapeutic jurisprudence see Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2006) 30(2) *Thomas Jefferson Law Review* 575.

paradigm is necessary.<sup>121</sup> Kuhn asserted that the transfer of allegiance from one paradigm to another is a 'conversion experience that cannot be forced'.<sup>122</sup> Lawyers and judges who have spent a long career working within the adversarial paradigm may well resist the assertion that a therapeutic paradigm is required, not based on some belief that specialist courts do not work, but that these courts are merely variations within the adversarial system and that all problems can, therefore, be dealt with by the adversarial courts.

As for the current nature of the debate between adherents of adversarialism and those proposing the mainstream application of therapeutic jurisprudence, it is difficult (although not impossible) to precisely identify advocates for a strong adversarialism. On the surface of the literature, there is almost an absence of theoretical debate between the two conceptual areas due perhaps to a reluctance of some professionals to be identified too strongly with either perspective.

There are those who do vigorously criticise therapeutic jurisprudence on doctrinal, ethical and constitutional grounds, and if we conceive of those practitioners and academics who actively resist the adoption of therapeutic jurisprudence principles (rather than just express scepticism or who are not prepared to commit), then a paradigm debate can be identified. Since academics, judges and practitioners advocating both paradigms are obviously intelligent and articulate people, it should be relatively easy for members of either group to understand what members of the other group are suggesting (making use of the meta benchmarking language that Kuhn allowed for). However, the absence of any significant theoretical (as opposed to doctrinal legal) debate in the literature may indicate that there is a lack of willingness to engage on a fundamental level.

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<sup>121</sup> Max Planck observed that 'a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it': Max Planck, *Scientific Autobiography and Other Papers* (F Gaynor trans, 1949) 33–4.

<sup>122</sup> SSR 151.

Therapeutic jurisprudence advocates seem to often publish quite lucid explanations of their core beliefs and hypotheses, but a fairly common critical response seems to be that these beliefs and hypotheses are too vague and simplistic. Likewise, critics seem to issue blanket statements that therapeutic jurisprudence assertions are contrary to due process and/or impermissibly paternalistic (with the intention that such statements act as conversation stoppers). Conversely, critics of the adversarial paradigm are prone to fixate on certain weaknesses in the current system of litigation and conclude that purported therapeutic refinements or alternatives to those impugned processes are neither contrary to due process nor paternalistic.<sup>123</sup> Such polarising and contradictory views, especially in the absence of a meaningful theoretical discourse, are what Kuhn would have considered to be strong evidence that we really are dealing with competing paradigms. The anticipated theoretical discourse usually takes place after the paradigm shift.

If we grant that a research community (which is intrinsically linked to a specialist profession) consists of the practitioners of a specialty, bound together by common elements in their education (and their academic/professional) apprenticeship, who consider themselves as responsible for the pursuit of a set of shared goals, including the training of their successors, communication within that community should not be characterised by misunderstandings and vague generalisations.

As discussed previously, the deep pragmatic conservatism in the practice of law is clearly reflected in the theoretical adversarial paradigm. The adversarial system operates pursuant to an, at times tacit, assumption that there is a legal solution to every dispute, or request for judicial adjudication, or determination brought before it. The system cannot be seen as unable to deal with any particular fact situation, however novel or intractable it may seem. To allow that the law cannot solve a problem is to

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<sup>123</sup> Evans and King, above n 28, 732.

raise the ugly spectre of the ‘pulling one thread argument’, in which the anomaly is then reproduced for similar (but not necessarily identical) fact scenarios and the core of legal principle and public confidence in the administration of efficient, objective and infallible justice is undermined. The overwhelming focus on rules and the perpetuation of the assumption, or myth, that they are derived from necessary and core theoretical principles is both the great strength and weakness of the adversarial system. It is a strength in that it promotes certainty and confidence, a weakness in that it can tend to delegitimise divergent views or critiques. An overemphasis on the certainty of outcome that an adversarial trial or hearing is supposed to provide ignores the aggregating body of data that shows that many legal processes do not work.<sup>124</sup>

Burke reminds us that traditions of judicial neutrality, independence and objectivity and detachment are ‘bedrock’, but that ‘if judges wear blinders that shield them from seeing the resources and outcomes of courts, they cannot be effective in modern society’. He says that it is unfortunate, however, that this is exactly what some judicial ethicists and ‘traditional allies of judicial independence’ want from judges. This equates to, Burke claims, neutrality to the point of isolation from becoming familiar or working with the resources of the problem-solving court.<sup>125</sup> This is certainly a reflection, at least in part, of a belief by some practitioners that adversarial processes and therapeutic processes are incommensurable. That is what Kuhnian incommensurability amounts to—a sociological phenomenon among some of those within a field that prevents or inhibits communication.

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<sup>124</sup> Such as the mounting evidence that imprisonment does not rehabilitate offenders or reduce recidivism rates, or that the issuing of domestic violence orders does not reduce the incidence of family violence.

<sup>125</sup> Burke, above n 91, 35.

## **Chapter 7**

### **Conclusion**

In answer to Freiberg's question of whether problem-oriented courts and the therapeutic jurisprudence movement have moved beyond the experimental mode and into the mainstream of justice I believe that this thesis demonstrates that it has. At least, this is so in the sense that the problem-solving ethos has generated genuine and productive debate among the judiciary and legal practitioners practicing in mainstream courts. This much, at least, is clear, based on the analysis of the current state of the relationship between adversarialism and therapeutic jurisprudence undertaken in chapters 5 and 6. Further, based on this same analysis, Freiberg was right to suggest that there are those within the non-adversarial legal community who indicate that a paradigm shift is underway. The object of this thesis has been, as Freiberg suggested, to give this claim of paradigm shift a serious consideration while being appropriately 'sceptical about such a sweeping claim'.

The place of therapeutic jurisprudence within a mooted paradigm shift is as much a matter of ontology, of settling on an agreed scope for therapeutic jurisprudence, as of looking for particular evidence of a shift. I concluded in Chapter 5 that there is reasonable evidence to support claims that therapeutic jurisprudence may constitute a Kuhnian paradigm in any of three ontological categories (that is, as a distinct juristic model, as part of a wider therapeutic or non-adversarial paradigm or as a discrete problem-solving paradigm). However, the drive to mainstream therapeutic jurisprudence, I concluded, is more about adding to the existing set of disciplinary exemplars, and refining some of those already in existence, than providing a definitive set of exemplars.

The identification of express disciplinary exemplars that stand as benchmarks against which particular legal rules, processes and roles can

be assessed as valid is the key to delineating a paradigm according to Kuhn. This is a critical finding of Chapter 2, which was applied to therapeutic jurisprudence in Chapter 5, where I considered the three ontological categories in depth. The exemplars are the solutions to problems and issues for the practitioner that cannot be solved by simply moving around and applying the existing rules or exemplars. Clear evidence is presented in chapters 5 and 6 (and indeed throughout the thesis) that processes and fora that are deeply influenced by therapeutic jurisprudence (such as the problem-solving courts) owe their existence to attempts to address puzzles (such as recidivism linked to drug addiction) that have become Kuhnian problems for the criminal justice system. As Kuhn says, by studying these exemplars and by practicing with them, the members of the corresponding community learn their trade. Momentum in the inclusion of therapeutic exemplars in legal education was illustrated in chapters 3, 5 and 6. It is hard to ignore the position of peak bodies such as the Australian Institute for Judicial Administration that concludes that:

[t]herapeutic jurisprudence is one of the most significant developments in the justice system. It [has] wide-ranging implications for judging, legal practice, court administration, corrections, legal institutions and processes generally and for legal and judicial education.<sup>1</sup>

Freckelton's characterisation of therapeutic jurisprudence (foreshadowed in Chapter 1) as being within its maturation phase resonates throughout a contemporary therapeutic jurisprudence literature that now does more than seek to simply make ad hoc and isolated recommendations about how mainstream judges and courts can be less anti-therapeutic. In my analysis of how therapeutic jurisprudence sees itself in Chapter 5, I noted Wexler's hope that lawyers and researchers might use therapeutic jurisprudence principles as a vehicle for fundamental, transformative societal change, and as a means of critiquing the 'roots of the law'. Given

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<sup>1</sup> <<http://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse?task=view&id=206>>. The Institute provides that: 'The aim of the Clearinghouse is to promote the exchange of information concerning therapeutic jurisprudence and its application and development within Australasia'.

the fundamental concern of the therapeutic jurisprudence method for not usurping due process, but rather for complementing it as a means for transformative change, we ought not to be surprised that the evidence suggests, as discussed in Chapter 5, that the role of the judge is malleable.

This malleability has probably always been a feature of the adversarial system, as was demonstrated in Chapter 4. Even a process as quintessentially adversarial as the trial by ordeal does not stand up to scrutiny as a tightly objective mechanism that simply adjudicates strict rights and obligations. Maitland's historic study of the recorded ordeal outcomes found only one case in which the ordeal did not acquit the accused. This was largely the work of the clergy, who saw the process as more of a political and social tool than an adjudication. Adversarialism clothes itself in objectivity, but in practice is often tolerant of innovations that allow for a consideration of extra-legal factors, so long as such innovations do not claim paradigmatic status for themselves. Malleability within the adversarial paradigm is tolerated because, as Kuhn suggests, formal rules are often held up as sacrosanct within a discipline but mutual understandings among practitioners about what it means to work in a given discipline is what truly defines it. These shared disciplinary understandings form the tacit knowledge of a discipline.

These sorts of mutual understandings among practitioners within a field is what Kuhn eventually came to mean by a paradigm. We can recall from the tracing of Kuhn's evolving view of the paradigm in Chapter 2, his ultimate position that paradigm 'stands for the entire constellation of beliefs, values, techniques and so on shared by the members of a given community'.<sup>2</sup> This thesis had some work to do in establishing that it was valid to extend the concept of the Kuhnian paradigm to disciplines outside of the natural sciences. In Chapter 3, I undertook this work, especially in relation to establishing that juristic models and legal systems could be

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<sup>2</sup> SSR 175.



governed by Kuhnian paradigms. There, I explained that although Kuhn's earlier work seemed to suggest that he considered disciplines outside of the hard sciences to not be governed by paradigms, this eventually collapsed into an assumption that researchers and practitioners in the social sciences and humanities would have no need for, nor interest in, a history of disciplinary change that focused on commonalities with science. That has turned out to be a significantly misplaced assumption on Kuhn's part. We saw in Chapter 3 that it is in fact the humanities and the social sciences that have most keenly pursued and applied the concept of the paradigm shift to their fields.

Kuhn himself acknowledged that differences in methodology were secondary to similarities in worldview and the ways in which disciplines educate their new members and rely on orthodoxy to preserve order within the discipline. The linking of elements of a liberal worldview to tenets of traditional adversarial practice in law was undertaken in Chapter 3, with the conclusion that if we posit a juristic model in order to make explicit some rules that have evolved in the common law jurisdictions to try and reduce complex social and legal problems to contests between relatively simple propositions, rights and values, a paradigm readily emerges.

Although there are issues of incommensurability between adversarialism and therapeutic jurisprudence (as discussed in Chapter 6), these issues, to some extent, drive the integration and mainstreaming process rather than prevent it. When confronted by Kuhnian problems, rather than by mere puzzles, the adversarial paradigm has adopted some non-adversarial exemplars. The adversarial disciplinary matrix exists within a normatively malleable environment. Wexler articulates that reality in this way:

But for TJ judging to thrive outside the problem-solving court arena, a TJ-friendly legal landscape is necessary. A useful heuristic is to think of TJ professional practices and techniques as

a 'liquid', and to think of the governing legal rules and legal procedures—the pertinent legal landscape—as 'bottles.'<sup>3</sup>

The reticence among some therapeutic jurisprudence scholars and practitioners to engage with the idea that therapeutic jurisprudence could be conceived of, or evolve into, a theory or philosophy might seem to weigh against it ever being seen by its leading thinkers as a paradigm of anything. However, this is probably based on a misconception of what a paradigm is. Birgden, a leading therapeutic jurisprudence practitioner in the field of offender management, expressly calls for something like a set of therapeutic exemplars by asserting that:

[t]herapeutic jurisprudence can provide the framework to balance justice and therapeutic principles. However, it can only provide the framework if it takes a normative stance, particularly in relation to offender autonomy. In order to take a normative stance, therapeutic jurisprudence needs to identify itself as a legal philosophy.

Schopp warns that if therapeutic jurisprudence is to continue to pursue an agenda of using social science data to promote reform in the operation of mainstream courts, then it:

must provide further normative arguments regarding the manner in which legal institutions ought to pursue psychological well-being when that value conflicts with other important values.<sup>4</sup>

Wexler's view on the normative dimension reflects the Kuhnian conception of a disciplinary matrix evolving as a reaction to practitioner intuitions in the face of seemingly intractable problems. New exemplars develop organically, not as some rigidly formulated or inflexible prescriptions. He observes that:

[w]hen we propose 'TJ-friendly' legal processes, we obviously enter into a discussion of the 'normative' notion of therapeutic jurisprudence ... the normative aspect of TJ is still being 'worked out.' It will thus likely emerge as the horse after the cart, a result I

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<sup>3</sup> David Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices' in Jane Donoghue (ed), *Therapeutic Jurisprudence and Problem-Solving Justice* (2013) (forthcoming).

<sup>4</sup> Robert F Schopp, 'Therapeutic Jurisprudence: Integrated Enquiry and Instrumental Prescriptions' (1999) 17(5) *Behavior Sciences and the Law* 589, 595.

regard as appropriate. To set a normative stage too early would work to restrict our thinking and options. I feel similarly with regard to formulating a tight (as opposed to an 'intuitive') definition of the term 'therapeutic' itself: a tight definition might simply be ignored by those who find it unduly narrow, rendering a proposed definition irrelevant; worse yet, if others were to take the tight definition seriously, that acceptance might prematurely restrict our thinking and creativity.<sup>5</sup>

There is little doubt that therapeutic jurisprudence seeks to do more than simply study and influence the effects of law on the well-being of those affected by it. Its wider agenda, according to some, is (or ought to be) to provide benchmarks against which legal rules and processes ought to be measured, and to motivate actual reforms to these rules and processes.<sup>6</sup> If we were to accept that 'motivate' in this sense may sometimes mean 'require', then these benchmarks take on the quality of paradigmatic exemplars.

In Chapter, I noted that even if therapeutic jurisprudence operates to simply insert some rules or exemplars within the core of the existing legal disciplinary matrix, then it will have succeeded in effecting paradigmatic change (albeit by modifying the existing paradigm rather than by replacing it). My argument has been that incommensurability is the feature of the Kuhnian paradigm shift that gives us the best insights into the relationship

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<sup>5</sup> David Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices' in Jane Donoghue (ed), *Therapeutic Jurisprudence and Problem-Solving Justice* (2013) (forthcoming). He concludes that '[t]hese observations are highly consistent with a related one: that TJ thinking ought to allow for the playing of "the believing game" with policy proposals, instead of reacting immediately in a critical "doubting game" manner'.

<sup>6</sup> According to Evans and King:

A TJ approach to problem solving looks to a multitude of circumstances, constraints and objectives to, where possible, maximise a mutually acceptable and sustainable solution to conflict. It can also be used for other purposes, such as to ameliorate the potentially negative side effects of adversarial dispute resolution processes and to inform the development of law and legal processes.

Adrian Evans and Michael King, 'Reflections on the Connection of Virtue Ethics to Therapeutic Jurisprudence' (2011) 35(3) *UNSW Law Journal* 717.

between adversarialism and therapeutic jurisprudence. It is a phenomenon that still creates a certain amount of unease among scholars, largely based on the assertion of Lakatos that, if true, it prevents any observer from concluding that a move from one research program (paradigm) to another is ever a simple, rational choice. It denies the view that we can understand the change from one theory to another without examining the social and political history of a discipline, that a simple analysis of the respective empirical assertions of each theory can fully explain a change. Taken at its strongest (as discussed in Chapter 6), incommensurability of paradigms means that a later theory cannot be derived from an earlier theory, given that the latter is based on new terminology, new meanings, standards and exemplars. There can be no deductive relationship between two incommensurable paradigms. However, lawyers and legal scholars need have little to fear from that conception of change given the slowness of a paradigm shift. As we saw in Chapter 2, a paradigm shift is generational. Overwhelmingly, those expected to practice pursuant to a particular paradigm will have been educated from within it. The whole thrust of Kuhn's argument is that the idea of some rapid, redefining revolution within a field is misleading.

One of Kuhn's most perspicacious insights is that those involved in a revolution need not conceive of themselves as revolutionaries, and neither should their critics. We need to complement this insight with his observation that disciplinary revolutions are nonlinear and can emerge as interesting fluctuations in the otherwise noisy context of the ordinary work being carried out in the background. Law has a very noisy background, largely because its myriad operations and processes are crucial to the existence and functioning of a liberal democracy.

Once the exemplars are in place, says Kuhn, then '[w]ork under the paradigm can be conducted in no other way, and to desert the paradigm is to cease practicing the science at all'.<sup>7</sup> We saw in Chapter 5 criticisms of

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<sup>7</sup> SSR 34.

some judges opposed to drug courts, and to therapeutic jurisprudence in particular, claiming that the role of the therapeutic judge involves work that is not properly that of a judge. Although there was some significant evidence of the emergence of therapeutic exemplars and their movement towards the core of the disciplinary matrix, we seem to be a long way yet from seeing a core dominated by therapeutic exemplars. The core may never, in fact, be dominated by them. Although many academic papers make use of the concept of paradigm shift to some extent, and Kuhn is often cited as some sort of license for the revisionism of the citer, there is no doubt that the language and conceptual framework of the Kuhnian paradigm shift is an invaluable way to conceive of the relationship between differing worldviews and methodological frameworks within a professional and academic discipline.<sup>8</sup>

The value of the Kuhnian conception of the paradigm to this thesis is not that it provides any 'algorithm for theory choice' (it does not provide a method for deciding whether an adversarial or therapeutic legal paradigm is to be preferred), but that it greatly assists in framing the extent of the tension between two significantly different juristic models. Only if that tension is properly framed and contextualised can we then explore the ways in which the tension can be resolved. The thrust of the thesis is that the tension constitutes the interplay of two different and competing Kuhnian paradigms. Whether those paradigms are articulated as an adversarial paradigm competing with a therapeutic/non-adversarial/comprehensive law is of no great import. It seems unlikely that we will see some blended model of court system in which some courts operate according to purely adversarial principles and some according only to therapeutic jurisprudence principles. If, as the thesis argues, therapeutic jurisprudence is positioning to paradigmatically change

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<sup>8</sup> Loving and Cobern suggested a similar explanation for why it seems to be that they frequently found that Kuhn was cited on page 1 or within the first few paragraphs of a book or article.

adversarialism, then some core elements of the adversarial paradigm will be replaced.

If this reasoning is accurate, then we are likely to see, in coming years, that adversarialism and therapeutic jurisprudence do not have a common language or reference point. For that reason, as Kuhn would suggest, therefore, there is no point in therapeutic jurisprudence advocates attempting to 'convert' adversarialists (such as Mason or Hoffman). The way to install a therapeutic jurisprudence paradigm would be by enthusing the next generation of jurists with its theory and methods (although, according to Kuhn, this is rarely an explicit strategy).

Jurists may be recognising that the law is emerging from a very long period of normal science and entering a time of crisis in the Kuhnian sense. Far from spending their time questioning the limits or validity of their paradigm, most practitioners during a period of normal science are actually trying to force nature (what they observe and experience) to fit their paradigm—and if that was not the case, most of the routine functions of the discipline could not continue.

I accept Kuhn's view (and that of most 21<sup>st</sup>-century scholars) that we cannot really characterise the legal world that we are observing independently of the theory we have about that world. As a social science, a humanity or at least a discipline outside the natural sciences, we do not need to extend the Kuhnian analysis or analogy to the extent of considering the claim that succeeding paradigms do not represent worldviews that are incrementally closer to the structure of the actual world. There is no need to conceive of successive juristic models as somehow getting closer to some ideal. Our juristic models are not really moving us towards anything in particular (so we need to be careful about on what it is we base claims of progression with respect to juristic models). We can say, though, that we have models that are organic and better adapted to contemporary conditions or beliefs about what we want the model to provide us with—perhaps a coherent theoretical framework for a

therapy-oriented court system. After all, Kuhn characterises a paradigm as a coherent system of concepts that brings order to the overall discipline and that rectifies the critical mass of anomalies that has accumulated during the period of crisis. It may well be that we are seeing more than just a shift in some sort of paradigmatic lens.

Kuhn suggests that when paradigms change, there are usually significant shifts in the criteria determining the legitimacy both of problems and of proposed solutions. This is the real tension that I believe Freiberg identified in his posited distinction between paradigm shift and pragmatic incrementalism. It highlights why it would be difficult to decide whether to select an adversarial or a therapeutic paradigm on which to base a legal system or any significant component of a legal system. Such a choice could not be made by applying what Kuhn referred to as the criteria of normal science.<sup>9</sup>

Kuhn asserted that when ‘two disciplinary schools disagree about what is a problem and what is a solution, they will inevitably talk through each other when debating the relative merits of their respective paradigms’. This is often manifested (as explored in detail in Chapter 6) in circular arguments where each position satisfies its own posited criteria. If adversarialism cannot acknowledge that a problem-solving court is ‘a court’ then it risks throwing the baby out with the bath water.<sup>10</sup>

Further, Kuhn consistently warns us in SSR that no paradigm is complete, in the sense that it never resolves all the problems it proposes—and which particular problems are left unresolved will differ between paradigms. Therefore, when comparing two posited paradigms such as adversarialism and therapeutic jurisprudence, we inevitably have to ask the question of which problems are more important to solve. The answer to that question

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<sup>9</sup> SSR 167.

<sup>10</sup> Kuhn observes that ‘[i]n the partially circular arguments that regularly result each paradigm will be shown to satisfy more or less the criteria that it dictates for itself and to fall short of a few of those dictated by its “opponent”’: SSR 168.

must come from outside of the paradigm and perhaps from outside the discipline itself. It could well be, for example, that the problem of drug-related offending and subsequent endemic recidivism is one for which public health policy demands a solution. Drug courts may argue that they are more effective in addressing that problem, but the choice as to how courts ought to deal with it will probably be made by stakeholders outside of the court system. Kuhn concludes that this 'it is this recourse to external criteria that most obviously makes paradigm debates revolutionary'.<sup>11</sup>

Apart from the dangers of not recognising that juristic thought may be in a time of crisis or revolution related to a conceptual paradigm shift away from adversarialism, which was alluded to throughout the thesis, there is also the concern that failure to accept the criticisms of the advocates of therapeutic jurisprudence, or to academically marginalise them, may lead to what Harold Bloom refers to as 'the anxiety of influence'.<sup>12</sup> Bloom's central thesis, when applied to law, would be that lawyers and judges are restricted in exercising their intuition and lateral, creative approaches by the ambiguous relationship they necessarily possess with respect to established adversarial theory and its exemplar practitioners (generally judges of the superior and appellate courts).

Granted, many lawyers, judges and legal academics are capable of learning from experience and conceiving of incrementally novel approaches to seemingly intractable problems in the justice system, but these newer approaches will always be tempered by varying degrees of respect and reverence for the express and implied theoretical positions of past and existing luminaries in the field. This is the 'influence' that Bloom says gives rise to the 'anxiety'. The greater that sense of respect (and perhaps fear), the more derivative and conforming will be the newer

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<sup>11</sup> Ibid.

<sup>12</sup> H Bloom, *The Anxiety of Influence: A Theory of Poetry* (1973). Bloom's theory is fundamentally a revisionary or 'antithetical' approach to literary criticism, but which has obvious implications for many fields of human endeavour, especially those of a more conservative nature.



approaches. My fear is that if challenges to the adversarial paradigm are not, themselves, seen as paradigmatic juristic models, then the innovations suggested by therapeutic jurisprudence will sacrifice real change for what Freiberg calls mere 'pragmatic instrumentalism'.